This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

Econ 7428.12

HARVARD COLLEGE
LIBRARY

TRANSFERRED FROM THE
GRADUATE SCHOOL
OF
BUSINESS ADMINISTRATION

Con 7428.12

HARVARD COLLEGE
LIBRARY

TRANSFERRED FROM THE
GRADUATE SCHOOL
OF
BUSINESS ADMINISTRATION

II.

BANKRUPTCY.

POLITICAL SCIENCE QUARTERLY.

A review devoted to the historical, statistical and comparative study of politics, economics and public law.

Plan.—The field of the **Quarterly** is indicated by its title; its object is to give the results of scientific investigation in this field. The **Quarterly** follows the most important movements of foreign politics, but devotes chief attention to questions of present interest in the United States. On such questions its attitude is non-partisan. Every article is signed; and every article, including those of the editors, expresses simply the personal view of the writer.

Editors.—The **Quarterly** is under the editorial management of the university faculty of Political Science, Columbia College.

Contributors.—The list includes university and college teachers, politicians, lawyers, journalists and business men in all parts of the United States, and English and Continental professors and publicists. Among the contributors of the past seven years have been, in addition to the members of the faculty:

Prof. H. C. Adams (Mich. U.), Statistician of the Interstate Commerce Commission; Pres. Andrews (Brown U.); H. O. Arnold-Forster; Prof. Ashley (Toronto U.); H. H. Asquith, M.P.; Sir Geo. Baden-Powell; Frederic Bancroft, Librarian State Dept. U. S. A.; Prof. Bemis (Vanderbilt U.); E. G. Bourne (Western Reserve U.); J. E. Bowen, *The Independent*; J. G. Brooks (Harvard U.); E. P. Cheyney (Penn. U.); Prof. J. B. Clark (Smith Coll.); Prof. Cohn (Göttingen U.); Clarence Deming, *New Haven News*; Rev. S. W. Dike; Hon. J. F. Dillon; J. P. Dunn, Jr., State Librarian (Ind.). Prof. Elliott (Minn. U.); R. P. Falkner (Penn. U.); Prof. Fornam (Yale U.); W. C. Ford, (formerly of the) State Dept. U. S. A.; Kuno Francke (Harvard U.); A. Gauvain, *Le Temps* (Paris); Prof. Giddings (Bryn Mawr Coll.); Prof. Gide (Montpellier, France), *Revue d'Economie Politique*; George Gunton; Prof. Hadley (Yale U.); Prof. Hart (Harvard U.); Geo. K. Holmes, Census Bureau, U.S.A.; Prof. Howard (Neb. U.); Prof. Hudson (Mich. U.); Prof. Huff (Vermont U.); Hon. Wm. M. Ivins; Prof. James (Penn. U.); Hon. John A. Jameson; Prof. Jenks (Ind. U.); Rev. Wm. C. Langdon; Prof. Laughlin (Cornell U.); Hon. Alfred E. Lee; Prof. Levermore (Mass. Tech. Inst.); Pres. Low (Columbia Coll.); Prof. Maitland (Cambridge U.); Brander Matthews; J. B. Moore, State Dept. U. S. A.; Prof. Morse (Amherst Coll.); Prof. G. B. Newcomb (N. Y. City Coll.); Prof. Patten (Penn. U.); J. H. Perkins; Fred. Perry Powers, *Chicago Times*; E. I. Renick, Treasury Dept., U. S. A.; Hon. Theodore Roosevelt; Hon. Irving B. Richman; Hon. Eugene Schuyler; Hon. W. L. Scruggs; Prof. Shaw (Cornell U.); Freeman Snow (Harvard U.); C. B. Spahr, N.Y. *Commercial Advertiser*; F. J. Stimson; Prof. Taussig (Harvard U.); Prof. Trent (Sewanee U.); Pres. Walker (Mass. Tech. Inst.); Prof. Warner (Neb. U.); Prof. Woodrow Wilson (Coll. of N. J.); Horace White, N. Y. *Evening Post*.

Reviews.—Each number contains careful reviews by specialists of recent publications.

Record.—The Record of Political Events, published twice a year, gives a résumé of political and social movements throughout the world.

Communications in reference to articles, reviews and exchanges, should be addressed to Prof. **MUNROE SMITH**, Columbia College, N. Y. City. Subscriptions should be forwarded, and all business communications addressed, to **GINN & COMPANY**, 70 Fifth Ave., N. Y. City; 120 Wabash Ave., Chicago; 9 and 13 Tremont Place, Boston.

Yearly Subscription, Three Dollars. Back Numbers and bound Volumes can be obtained from the publishers.

II.

BANKRUPTCY.

STUDIES IN HISTORY, ECONOMICS AND PUBLIC LAW.

EDITED BY
THE UNIVERSITY FACULTY OF POLITICAL SCIENCE
OF COLUMBIA COLLEGE.

Volume II.] [Number 2.

BANKRUPTCY.

A STUDY IN COMPARATIVE LEGISLATION.

BY

S WHITNEY DUNSCOMB, JR., PH. D.,

Seligman Fellow in Political Science, Columbia College.

COLUMBIA COLLEGE.
NEW YORK.
1893

Econ 7428.12

HARVARD COLLEGE LIBRARY
RECEIVED THROUGH THE
GRADUATE SCHOOL OF
BUSINESS ADMINISTRATION
JUN 9 1930

B

TABLE OF CONTENTS.

PART I. EUROPE.

PART II. UNITED STATES.

BANKRUPTCY.

A STUDY IN COMPARATIVE LEGISLATION.

PART I.—EUROPE.

CHAPTER I. BANKRUPTCY IN GENERAL.

§ 1. *Introductory.* In nearly every modern State the situation of a trader who has ceased to pay his debts as they mature in the ordinary course of business is regulated by special provisions of law. This condition of affairs, which is known as insolvency, may have been the result of misfortune entirely undeserved, of imprudence and incompetence, or of fraudulent conduct. But in any case, the public interest is so closely involved, by reason of the plurality of creditors who have claims against the debtor, that in most countries the intervention of a public authority has been thought necessary to adjust the conflicting rights, and to discover and punish any wrong-doing. "The law," it has been said, "considers a bankrupt neither as guilty nor as innocent, but as a debtor whose conduct demands a careful examination, because there has been on his part a violation of engagements which may have been caused by misfortune, misconduct, or bad faith. If by misfortune, the bankrupt should be protected; the creditors should not be permitted to keep him imprisoned and deprive him of the means of resuming his business. If by misconduct, he should be

subjected to punishment. If by fraud, he should be delivered over to the severity of the criminal law.[1]

§ 2. *Definition.* The commercial codes and laws of most of the European States contain definitions of the state of insolvency. Thus the French and Italian Codes of Commerce say: "Every trader who stops payment is in a state of insolvency."[2] The Spanish Code gives a similar definition: "Every trader who stops current payment of his obligations is to be considered in a state of insolvency."[3] The Belgian law declares that: "Every trader who stops payment, and whose credit is impaired, is in a state of insolvency."[4] The Code of the Netherlands gives the following definition: "Every trader who stops his payments is by judicial sentence declared to be in a state of insolvency."[5] The Portuguese Code declares: "That trader is insolvent who, in consequence of misfortune or of his own fault, or of both of these causes combined, is obliged to stop payment and refrain from devoting himself to business."[6] The Russian law, as paraphrased by Leuthold, says: "Insolvency of a merchant exists when the holder of a commercial or trade license is in such a situation that he does not possess sufficient means to pay in due season debts exceeding in value 1500 rubles, and signs appear from which it may be concluded that his property is inadequate for the full payment of his debts. Among such signs are mentioned his own confession before the judge or to creditors, proof by the creditors that the property remaining

[1] Couder, *Dictionnaire de Droit Commercial.* Paris, 1877–1881. Tome 4, Section 1.

[2] *Code de Commerce*, Livre III. Art. 437; *Codice di Commercio del Regno d' Italia*, Libro III, Titolo I, Art 683.

[3] *Código de Comercio, promulgado en 30 de Mayo, 1829*, Libro IV, Titulo I, Art. 1001; *Código de Comercio, promulgado en 22 de Agosto, de 1885*, Libro IV, Titulo I, Art. 874.

[4] *Loi du 18 avril, 1851*, Art. 437.

[5] *Wetboek van Koophandel*, Boek III, Titel I, Afdeeling 1, § 764.

[6] *Codigo Commercial Portuguez*, Parte I, Livro III, Titulo XI, §1121.

after the sale of the debtor's property to cover a secured debt will not suffice to pay the remaining creditors, the absconding of a debtor after the day of payment, or, without arranging for the continuation of his business, before the day of payment."[1] The Austrian law gives no definition, but says: "As soon as a trader stops his payments, he must make a declaration of the fact on the same day to the Court of Bankruptcy."[2] The German law says that the opening of a bankruptcy proceeding presupposes insolvency, and that insolvency results from the fact of a stoppage of payment.[3] The English law does not define the term but enumerates certain "acts of bankruptcy" upon which alone the petition for a declaration of bankruptcy may be based.[4] The Danish and Norwegian laws likewise give no definition, but provide that the debtor who believes that he cannot meet his engagements may petition for a declaration of bankruptcy; and, like the English law, they enumerate certain acts upon which a creditor may base his application.[5]

From these definitions it will be seen that the essential element in every insolvency is the cessation of payments. The differences appear in the methods provided for determining what is sufficient to amount to a cessation of payments and in the consequences which follow therefrom. In England, Denmark and Norway the laws specify certain acts which will entail an adjudication of bankruptcy, while in the other countries under consideration the determination of the conditions which constitute such a stoppage of payment as will result in bankruptcy is left to the courts.

[1] Leuthold, *Russische Rechtskunde*, Leipzig, 1879. Teil II., § 22, II.

[2] *Concursordnung*, Teil II., Hauptstück II., § 194. Gesetz vom 25 December, 1868, *Reichsgesetzblatt*, 1869, No. 1.

[3] *Konkursordnung*, Buch II., Titel II., § 94, Gesetz vom 10 Februar, 1877. *Reichsgesetzblatt*, 1877, No. 10, SS. 351–389.

[4] *Statutes 46 and 47 Victoria*, chapter 52, § 4.

[5] *Bulletin de la Société de Législation Comparée*, 1885, p. 65; loi danoise, Art. 41–44; loi norvégienne, Art. 2–5.

As an illustration of the tendency of these two systems to approach each other, it is interesting to note that Mr. Alexander Robertson criticises the English law in this respect as causing needless litigation and expense to creditors, and urges the advisability of admitting bankruptcy "in all cases where either the debtor in person or one or more of his creditors should establish that the debtor is not in a state to pay his debts in full;"[1] while on the other hand M. Victorio Lanza, commenting on the draft for the new Italian Code, suggests that the fact of cessation of payments should be accompanied by certain signs to guide the judge, and should not be left wholly to his discretion.[2]

A cessation of payments will not, however, in every system of legislation necessarily result in an adjudication of bankruptcy. In France, Austria and Germany, it will; for their laws take no account of temporary embarrassments in which a trader may be placed, although his assets may be sufficient to ultimately meet his engagements. But there are a few countries (Belgium, Italy and Spain) that cover such a case by recognizing suspension of payments.

§ 3. *Suspension of Payments.* The Belgian law of 1851 provided that suspension of payment (*le sursis de payement*) was only to be granted to a trader who, owing to extraordinary and unforeseen events, was obliged to stop payment temporarily, but who, according to his duly-verified balance sheet, had property or means enough to satisfy all his creditors in principal and interest.[3] The court, however, could grant this respite only with the concurrence of a majority of the creditors whose claims amounted to three-fourths of the sum due,[4] and it continued for but twelve months, renewable for another twelve months. In one exceptional case, a second renewal of

[1] *Law Magazine and Review*, London, February, *1879*.

[2] 'Les Réformes en matière de Faillite', *Traité de Droit Commercial et Pénal.*

[3] *Loi du 18 avril, 1851*, Art. 593.

[4] *Ibid.*, Art. 599.

a year's duration could be granted, *viz.*, to a debtor who proved that during the preceding respites he had liquidated at least sixty per cent. of his liabilities.[1] During the period of suspension no executions could be levied against the person or goods of the debtor, but imprisonment or executions effected before the respite remained in force, unless the court should decide otherwise after hearing the debtor and creditors.[2] The law of December 26th, 1882, did not substantially alter these rules; but by the law of June 20th, 1883, the Belgians, without repealing the former legislation, have furnished a substitute by establishing a composition that will forestall bankruptcy (*concordat préventif.*)[3] This enables the unfortunate debtor in certain circumstances to escape bankruptcy by a request to the proper tribunals for permission to enter into an arrangement with his creditors.

The Italians by their new Code of 1882 have also introduced the device of suspension of payments. With them the delay (*moratoria*) can be obtained even more readily than in Belgium, for the court may grant it when the majority in number only approve, and the procedure is in other respects simplified. On the other hand, it continues for but six months, subject to one renewal.[4] In Spain also we find suspension of payments (*suspension de pagos*) regulated by the new Code of 1885. Within forty-eight hours from the stopping of his payments, the debtor may petition the court to pronounce the suspension, and within ten days thereafter he must submit to his creditors propositions for a composition, for the regulation of which the ordinary rules in regard to compositions apply. If the propositions are rejected or not approved by the required number, the parties interested are restored to their former rights.[5] As this privi-

[1] *Ibid.*, Art. 600.

[2] *Ibid.*, Art. 604.

[3] *Cf.* chapter VI., sec. 3.

[4] *Codice di Commercio*, Titolo VI., Capo. II., §§ 819–829.

[5] *Código de Comercio*, Libro IV., Titulo I., Sec. I., Art. 870–873.

lege is extended not only to merchants whose accounts indicate the possession of assets sufficient to eventually discharge all their engagements, but to those whose assets will not equal their liabilities, it is in reality not a suspension of payments in the proper sense, but a preventive composition.

From the point of view of the creditors, there may be serious disadvantages in admitting suspension of payments, and it is certainly a considerable departure from the rigorous system of bankruptcy exemplified by the French law of 1838. It is true, as the French critics maintain, that from a mere examination of the debtor's accounts the court cannot always determine positively what may be the ultimate relation between the assets and liabilities. Nevertheless this clemency is entirely in accord with the more humane ideas of the present time, and the tendency in nearly every country is to ameliorate the condition of the honest but unfortunate insolvent. The spirit of the Roman law of the Twelve Tables (*de debitore in partes secando*) which allowed the creditors to make speedy and equitable division of the body of the debtor, is not reappearing in the laws of this period. Even the Continental legislator is beginning to realize that possibly a debtor may have rights as well as his creditors.

§ 4. *Who may become a Bankrupt.* In some countries the bankrupt laws are made applicable only to insolvent merchants or traders. In others, they are extended to non-traders as well. Traders are defined by the French Code of Commerce as those persons who are habitually occupied in commercial transactions.[1] The Code of the Netherlands says that traders are those who do acts of commerce, and whose actual profession is trade. Among acts of commerce it mentions the purchase of goods for the purpose of reselling the same either wholesale or retail, either in their natural or manufactured state, or merely for the purpose of letting the same for hire.[2]

[1] Livre I., Tit. I., Art. I.

[2] Boek I., Titel I., Art. 2, 3

In this respect the line of cleavage may be drawn between the countries of the Latin and those of the Germanic and Anglo-Saxon races, the former limiting the application to commercial debtors exclusively, the latter extending it to all citizens. The line is broken, however, by Spain, which in 1881 established a bankruptcy for non-traders called "*concurso de acreedores*."[1] In Italy also the desirability of assimilating all debtors in the bankruptcy system has been much agitated among students and theorists, although the proposition was rejected by the framers of the new Code; and in France the provisions made for civil insolvency (*déconfiture*) are recognized as inadequate, but the French appear unwilling to follow the example of the Spaniards, In France the non-trader who is unable to pay what he owes because his liabilities are greater than his assets, is said to be in a state of *déconfiture* or civil insolvency, which differs from *faillite* or commercial insolvency in that the sole element constituting this state is the known insufficiency of his assets to discharge his liabilities, whereas the important ingredient of *faillite* is the cessation of payments regardless of the amount of the assets.[2] Russia, like France, has not assimilated non-traders to traders, but has prescribed for them particular forms of proceeding;[3] and the draft for a Federal law upon bankruptcy for Switzerland now in process of formation has adopted the French instead of the German idea, and refused to bring non-traders within the operation of the law. In Greece, the French Code (which is in force in that country) has been modified by a clause rendering liable to bankruptcy one who has abandoned commerce, if he has ceased his payments while still a trader.[4]

While both Germany and Austria admit all debtors to bankruptcy, the assimilation of the two classes is not so complete in

[1] *Ley de Enjuiciamiento Civil*, Libro II., Titulo XII., Art. 1130–1317.

[2] Couder, *Dictionnaire de Droit Commercial*, Tome 3, p. 700.

[3] Leuthold, *Russische Rechtskunde*, § 37 SS. 354 and 361.

[4] *Annuaire de Législation Étrangère*, 1879, p. 673.

the latter as in the former country. For example: The Austrian law makes a difference in the treatment of traders and non-traders in the matter of a composition. It distinguishes between commercial bankruptcy, and bankruptcy of common law. In the former, a composition under the direction of the court may be obtained, if it is approved by at least two-thirds of the creditors whose claims equal at least three-fourths of the total sum due.[1] In the latter, the ordinary proceedings for the liquidation and distribution of the assets must continue, and can be terminated prematurely only by a compromise to which all the creditors assent, or subject to a payment to the non-assenting creditors of the full amount of their claims.[2] In Hungary, bankruptcy was the same for traders and non-traders until the passage of the law of March 27th, 1881. By this law the assimilation is preserved upon the essential points. Thus it does not follow the Austrian law in refusing a composition to non-traders. The differences appear in matters of detail, and are confined to some special obligations imposed upon a trader, such as the surrender of his books and the production of a balance sheet. In the case of traders, moreover, proof by a creditor of the cessation of payments is sufficient to obtain an adjudication of bankruptcy against the debtor; whereas in the case of non-traders, a creditor to achieve this end must establish that his debtor's liabilities exceed his assets.[3]

Norway and Denmark[4] accord in general with the other Germanic countries in this particular. Nevertheless, in their enumeration of the "acts of bankruptcy" upon which a creditor may base his petition, some differences in the treatment of

[1] *Concursordnung*, § 217, (1), (2).

[2] *Ibid.*, § 156.

[3] *Annuaire de Législation Étrangère*, 1882, p. 322.

[4] *Bulletin de la Société de Législation Comparée*, 1885, p. 64, containing a comparison by M. Beauchet between the Norwegian law of June 6th, 1863, and the Danish law of March 29th, 1872.

traders and non-traders appear. When a debtor who is a trader, manufacturer, ship-owner, (or, in Norway, an owner of a mine,) or who has been such within a year previous, stops his payments, so long as this suspension continues, his bankruptcy may be demanded by a creditor without the necessity of offering any further proof of his insolvency.[1] Bankruptcy may also be demanded if a creditor owning a matured claim not contested and not secured, has given a summons to a debtor who exercises or has exercised within the year one of the previously mentioned professions, provided also that the debtor has not paid within a certain period after receiving the summons. The period is forty days in Denmark and thirty days in Norway.[2]

In England, bankrupt laws were for a long time limited in their operation to traders, while non-traders were left exposed to the suits of their creditors, and payment in full was the only escape from their debts. But the law of 1883[3] entirely abolishes this distinction, and declares that all debtors may be adjudged bankrupt, even including persons that have the privilege of Parliament.[4] The reasons why the benefit of bankrupt laws was so long confined to those engaged in commercial pursuits was well stated by Blackstone:

"The laws of England," he says, "are cautious of encouraging prodigality and extravagance by this indulgence to debtors, and therefore they allow the benefit of the laws of bankruptcy to none but actual *traders*, since that set of men are, generally speaking, the only persons liable to accidental losses and an inability of paying their debts without any fault of their own. If persons in other situations of life run in debt without the power of payment, they must take the consequences of their own indiscretion, even though they

[1] Denmark, Art. 43; Norway, Art. 5. Norway requires that the suspension shall have continued eight days before the declaration of bankruptcy.

[2] Denmark, Art. 44; Norway, Art. 5.

[3] *Statutes 46 and 47 Victoria*, c. 52.

[4] *Ibid.*, § 124.

meet with sudden accidents that may reduce their fortunes; for the law holds it to be an unjustifiable practice for any person but a trader to encumber himself with debts of any considerable value. If a gentleman, or one in a liberal profession at the time of contracting his debts, has a sufficient sum to pay them, the delay of payment is a species of dishonesty, and a temporary injustice to his creditor; and if, at such time, he has no sufficient fund, the dishonesty and injustice is the greater. He therefore cannot murmur if he suffers the punishment he has voluntarily drawn upon himself. But in mercantile transactions the case is far otherwise. Trade cannot be carried on without mutual credit on both sides. The contracting of debts is therefore here not only justifiable, but necessary. And if by accidental calamities, as by the loss of a ship in a tempest, the failure of brother traders, or by the non-payment of persons out of trade, a merchant or trader becomes incapable of discharging his debts, it is his misfortune and not his fault. To the misfortunes, therefore, of debtors the law has given a compassionate remedy, but denies it to their faults, since at the same time that it provides for the security of commerce by enacting that every considerable trader may be declared a bankrupt, for the benefit of his creditors as well as himself, it has also (to discourage extravagance) declared that no one shall be capable of being made a bankrupt but only a trader."[1]

This argument of Blackstone's is open to some objections. It is hardly true that actual traders are the "only persons liable to accidental losses, and to an inability of paying their debts without any fault of their own." Very hazardous also is the occupation of the farmer; yet when he became embarrassed, in the former state of the law, he was only entitled to the benefits of the insolvent acts, namely, escape from imprisonment by a surrender of his property.

§ 5. *The Different Kinds of Insolvency.* In all countries, it is recognized that insolvency may result from a variety of causes. The debtor may be a man of unimpeachable integrity and average ability, and yet be overwhelmed by

[1] *Commentaries on the Laws of England*, Book II., Chapter XXXI., Chase's Edition, p. 581.

a combination of circumstances entirely beyond his foresight and control. On the other hand, commercial disaster may have been occasioned by his dishonest conduct. Between these extremes there may exist a whole series of causes, such as incompetence, reckless speculations, miscalculations, extravagant expenditures, *etc.* In many countries, therefore, we find classifications of the different kinds of insolvency based primarily upon the distinction between good faith and fraud. In others, while there is but one kind recognized, special provision is made for the punishment of fraudulent debtors, and the annulment of fraudulent acts done in contemplation of insolvency.

In the laws of France, Belgium, Italy and the draft of the new Swiss code, distinctions are drawn between insolvency, simple bankruptcy and fraudulent bankruptcy.[1] An insolvency attended with no fraudulent circumstances is called in French law *faillite*, insolvency or failure. One in which are discovered transactions punishable by law is called *banqueroute*, or criminal bankruptcy. Of *banqueroute* there are two kinds, *banqueroute simple*, or simple bankruptcy, and *banqueroute frauduleuse*, or fraudulent bankruptcy.

Simple bankruptcy is punishable by imprisonment for from one month to two years. The prosecution can take place at the instance of the *ministère public*,[2] of the *syndics*,[3] or of the creditors; but the syndics cannot proscute unless so author-

[1] France, *Code de Commerce*, Art. 437, 582, 591; Belgium, *Loi du 18 avril, 1851*, Art. 437, 573, 577; Italy, *Codice di Commercio*, Art. 683, 856, 860.

[2] *Ministère public* is the generic name given to certain officials attached to the civil and criminal courts, who represent the government and society. In criminal cases they proceed against the accused in the name of the public. In civil matters also they may always be heard, but this is only necessary in suits which concern the state, the communes, or minors and other suitors civilly incapacitated. Guilleman, *De l'Organisation Judiciaire en France*, Paris, 1879, p. 7.

[3] The syndics are the persons appointed by the court to administer the bankruptcy. They correspond to the trustees of the English and the assignees of the American laws.

ized by a majority of the creditors present at the meeting at which this question was raised. Prosecution for simple bankruptcy is barred after three years, and the mere attempt to commit it entails no penalty.

Fraudulent bankruptcy is a crime liable to punishment by penal servitude for from five to twenty years. The prosecution is instituted by the *ministère public*, and is barred after ten years. An attempt to commit fraudulent bankruptcy is liable to the same punishment as the crime itself.

To be convicted of simple bankruptcy the debtor must have been guilty of serious faults in the conduct of his business, not amounting, however, to actual fraud. The circumstances which establish this species of bankruptcy may be of two kinds. First, there are facts which, when proven, lead necessarily to a condemnation because they were of constant occurrence, although there may be nothing to indicate any bad intent on the debtor's part. These are as follows: (1) that the personal expenses of the bankrupt or his family have been excessive; (2) that he has lost large sums of money in hazardous speculations on the Stock Exchange or in produce or goods; (3) that with the intention of delaying his bankruptcy he has had recourse to loans, bills, or other ruinous means of obtaining money; and (4) that after having suspended payment, he has paid any one creditor to the prejudice of the estate. Second, there are facts which even when proven still leave it entirely to the discretion of the tribunal whether or not the debtor shall be pronounced guilty of simple bankruptcy. These are as follows: (1) that the bankrupt has contracted, for the account of others and without receiving value in exchange, engagements of greater magnitude than his circumstances would warrant; (2) that he is again declared bankrupt without having carried out the provisions of a former composition; (3) that within three days from the cessation of payment, he has not made the necessary declarations to the Registrar of the Tribunal of Commerce; (4) that without a legal excuse he has not ap-

peared personally before the syndics in the cases and at the times prescribed, or that, after having obtained a *sauf conduit*[1] he fails to appear before the court when summoned; (5) that he has not kept books or made an inventory, that his books or inventories are incomplete or irregular, or that they do not show the real position of his assets and liabilities.

To be convicted of fraudulent bankruptcy, the debtor must have committed frauds to the prejudice of his creditors. Such acts are withholding his books, concealing or disposing of any part of his estate, whether before or after the adjudication of bankruptcy, or fraudulently representing himself to be indebted for moneys which he is not liable to pay.[2]

In Germany, debtors who have stopped payment or against whom a bankruptcy proceeding has been commenced are punished as fraudulent bankrupts, with penal servitude (*Zuchthaus*), if with the intention of injuring their creditors they have concealed or removed articles of property, acknowledged debts that are wholly or in part fictitious, failed to keep books of account when such duty is imposed by law, destroyed or concealed their books, or so kept or altered them that they furnish no true statement of the condition of their affairs.[3] They are punished as simple bankrupts, with imprisonment at labor for not more than two years, if they have employed excessive sums or become indebted by means of extravagant expenditure, gambling, or trading on differences (*Differenzhandel*)[4] in goods or stock-exchange papers; if they have neglected to keep commercial books, which they were bound by law to keep, or have concealed, destroyed or kept such

[1] Immunity from arrest granted in certain cases to persons under indictment.

[2] Goirand, *Commentary on the French Code of Commerce*, London, 1880, pp. 429–434.

[3] *Konkursordnung*, § 209.

[4] *Differenzhandel* is an arrangement between a buyer and seller in accordance with which the seller is not to deliver the goods themselves, but only pay the difference between the stipulated purchase price and the market price of the goods at the place and at the time agreed upon for the delivery.

books in such a disorderly manner that they do not convey a clear idea of the condition of the property, or contrary to the regulations of the commercial code,[1] have neglected to draw up a balance sheet of their property within the time prescribed.[2] It is further provided that debtors who have stopped payment or with regard to whose property proceedings in bankruptcy have been instituted, shall be punished by imprisonment at labor up to two years, if they, although aware of their insolvency, have, with a view to favor a creditor above the rest, guaranteed such creditor a security or satisfaction to which he had no claim in such manner or at such time.[3]

In Austria, this matter is not regulated in the bankrupt law, and it is in the Penal Code that we must look for the punishment meted out to simple and fraudulent bankrupts. If a debtor becomes bankrupt and cannot prove that it was through misfortune alone that he has become unable to pay his creditors in full; or if he has been guilty of extravagance, or if after he is already insolvent he has not announced the fact immediately to the court, but contracted new debts, made fresh payments, or assigned a pledge or other security, such person, in so far as he has not committed what the law regards as fraud (*Betrug*) is guilty of a misdemeanor (*Vergehen*) and is to be punished with strict arrest (*strenger Arrest*)[4] for from three months to one year. This same penalty will be inflicted upon a trader who has become bankrupt, in certain additional cases, *viz.*, if he has entered upon a business when already involved in debt, or if he has entered upon a business for the conduct

[1] *Handelsgesetzbuch*, Art. 29.

[2] *Konkursordnung*, § 210.

[3] *Ibid.*, § 211.

[4] *Strenger Arrest* in Austria is the second grade of the punishment of *Arrest*, which is inflicted upon those guilty of misdemeanors and minor offenses. The culprit is imprisoned without fetters, and his maintenance and occupation are governed by the regulations of the institution in which he is confined. *Strafgesetzbuch*, § 245.

of which the commercial law requires a certain amount of capital, without possessing the same and by deceiving the proper authorities as to the true condition of his property; if having already been a bankrupt, he has by false declarations as to the existence of certain conditions obtained permission to enter again upon the conduct of his business, in so far as this permission is, according to law, dependent upon such conditions; if he has not kept the prescribed commercial books or has kept them so imperfectly that the course of his business and the condition of his property cannot be determined therefrom; if, even as regards single items, he has committed intentional errors in his book-keeping; if he has wholly or partially destroyed or suppressed his books or altered their contents; if he is unable to give satisfactory explanations in regard to the origin of his debts or the manner in which he has employed considerable receipts in money, goods or other articles; if he has engaged in feigned contracts for the delivery of commercial paper or goods which according to their true nature, are mere wagers, or in other hazardous transactions disproportionate to his means, and finally if, when already aware that his liabilities exceed his assets, he has sought to delay the opening of bankruptcy by selling his goods below their true value or by other means prejudical to his creditors, although not fraudulent.[1] It will be seen that the Penal Code has here made provision for a state of things corresponding to the simple bankruptcy of the laws previously considered.

Provision is also made for what corresponds to fraudulent bankruptcy. It is declared that he is guilty of a felony (*Verbrechen*), who, in consequence of prodigality, has become unable to pay his debts, or through trickery has sought to prolong his credit, or by naming fictitious creditors, or otherwise by means of fraudulent agreements or concealment of a part of his property, has distorted the true condition of his estate.[2]

[1] *Strafgesetzbuch*, § 486.

[2] *Ibid.*, § 199, f.

The punishment is generally the first grade of imprisonment (*Kerker*)[1] for from six months to a year; or, if there are aggravating circumstances, for from one to five years.[2] If the amount or value which the wrongdoer has procured or intended to procure by his fraudulent act, exceeds a certain sum (300 gulden) or if he has committed the fraud with peculiar boldness or cunning, or has made a continual practice of such acts, the punishment is the second grade of imprisonment (*schwerer Kerker*)[3] for from five to ten years.[4]

England has a law for "the punishment of fraudulent debtors," and embraces under this general head the cases corresponding to simple and fraudulent bankruptcy.[5]

The Russian Code defines as unfortunate or undeserved insolvency the case where a debtor has become embarrassed through no fault of his own, but by a concurrence of circumstances, the nature of which the law determines, *viz.*, flood, fire, invasion of the enemy, or the unexpected insolvency of his debtors. The debtor is an imprudent or simple bankrupt when his troubles have been occasioned by his own fault, but without fraud or premeditation; while the presence of premeditation and bad faith makes the bankruptcy fraudulent. The Court, in deciding each particular case on its own merits, determines the character of the bankruptcy and its attendant results.[6]

[1] The convicted man is imprisoned without fetters, although closely guarded, and his maintenance is governed by the regulations of the institution in which he is confined. He cannot meet any one except in the presence of his jailor, and cannot hold any conversation in a language unintelligible to the latter. *Ibid.*, § 15.

[2] *Ibid.*, § 202.

[3] The prisoner is kept with irons on his feet. Conversation with persons other than those immediately employed in his custody is allowed only in special cases. *Ibid.*, § 16.

[4] *Ibid.*, § 203.

[5] *Statutes 32 and 33 Victoria*, c. 62.

[6] Leuthold, *Russische Rechtskunde*, § 37, S, 354.

In Spain, according to the old code of 1829, there were five grades of insolvency and bankruptcy: (1) Suspension of payments; (2) casual insolvency (*insolvencia fortuita*); (3) culpable insolvency (*insolvencia culpable*); (4) fraudulent insolvency, and, (5) *alzamiento*.[1] This last-mentioned term, which cannot very well be translated, seems to imply both the disappearance of the bankrupt and the withdrawal of his property.[2] It is defined as maliciously concealing or removing goods in order to defraud creditors.[3] The lines of demarcation between these different classes were not clearly drawn, and nothing was gained by adopting so elaborate a classification. The new Spanish code has reduced these classes to three, by treating suspension of payments under a separate head, and consolidating the fourth and fifth classes. We thus have casual, culpable and fraudulent insolvency.[4]

§ 6. *Declaration of Bankruptcy.* In every country the legal status of bankruptcy must be declared by the competent judicial authority. This is usually the court of the debtor's domicile, and in those countries where such special tribunals have been established it is the Court of Commerce. There are three ways in which the court may be put in motion: by the declaration of the debtor himself, by the petition of one or more creditors, or the court may act *proprio motu*. In some countries the right to apply for the benefit of the bankrupt act is granted to the insolvent as a privilege. In others, he is compelled by law upon his cessation of payments to make known to the court the condition of his affairs.

In France,[5] Belgium,[6] and Italy,[7] the court may declare the

[1] *Código de Comercio de 1829*, Art. 1002.

[2] *Ibid.*, Art. 1012, 1013.

[3] Mas y Abad, *Diccionario de la Legislacion Española*, Madrid, 1877, p. 320.

[4] *Código de Comercio de 1885*, Art. 886.

[5] *Code de Commerce*, Art. 438, 440.

[6] *Loi du 18 avril, 1851*, Art. 440, 442.

[7] *Codice di Commercio*, Art. 684, 686.

debtor a bankrupt either upon his own declaration (which he is under a legal duty to make), upon the petition of one or more creditors, or of its own motion. In England,[1] Germany,[2] Austria,[3] Hungary,[4] Spain,[5] and Portugal,[6] the court never acts in this matter of its own motion. The legislatures of these countries have seen no reason for any judicial interference where no demand has been made by any private interest. In England, no duty is imposed upon the debtor to report to the court the commission of any of the enumerated "acts of bankruptcy," although he may voluntarily apply to be adjudged bankrupt, and thus become entitled to the benefits of the law. The petition of the debtor is itself an act of bankruptcy.[7] In France,[8] Spain,[9] Italy,[10] Belgium,[11] Germany,[12] Austria,[13] and Hungary,[14] any creditor, without regard to the amount of his claim, may petition; but in England, this right is confined to one whose claim is at least £50, or to several the aggregate of whose claims amounts to at least £50. If the petitioner is a secured creditor, he must in his petition either state that he is willing to give up his security for the benefit of the creditors in the event of the debtor being adjudged bankrupt, or give an

[1] *Statutes 46 and 47 Victoria*, c. 52, § 5.

[2] *Konkursordnung*, § 95.

[3] *Concursordnung*, §§ 62–66, 198.

[4] *Annuaire de Législation Étrangère, 1882*, p. 322.

[5] *Código de Comercio de 1829*, Art. 1016, 1017; *Código de 1885*, Art. 875; *Ley de Enjuiciamiento Civil*, Art. 1323, 1324.

[6] *Código Commercial*, § 1124, 1126.

[7] *Statutes 46 ana 47 Victoria*, c. 52, § 4 f.

[8] *Code de Commerce*, Art. 440.

[9] *Código de Comercio*, Art. 875; *Código Antiguo*, Art. 1016.

[10] *Codice di Commercio*, Art. 687.

[11] *Loi du 18 avril, 1851*, Art. 442.

[12] *Konkursordnung*, § 95.

[13] *Concursordnung*, §§ 63, 198.

[14] *Annuaire de Législation Étrangère*, 1882, p. 322.

estimate of the value of his security. In the latter case, he may be admitted as a petitioning creditor, to the extent of the balance of the debt due to him after deducting the value so estimated, in the same manner as if he were an unsecured creditor.[1] In Germany,[2] Austria[3] and Hungary[4] when the demand is made by the creditors the debtor must be afforded an opportunity to be heard in his own behalf so that he may convince the court, if possible, that the facts do not exist which would render bankruptcy justifiable. In England this is effected by a provisional judgment of sequestration or "receiving order." An official receiver is appointed to take charge of the debtor's property. This functionary is an officer of the Board of Trade, who is attached to the court having bankruptcy jurisdiction. By this order the debtor is deprived of the possession and disposition of his property, and is prohibited from entering into new contracts. He, however, suffers no political disability, nor is he divested of the legal title to his property—the ordinary result in England of an adjudication of bankruptcy. The creditors may not levy any executions without permission of the court. Meanwhile the official receiver examines into the accounts and conduct of the debtor, to ascertain whether he is in fact insolvent and whether he has performed any acts which the law brands as fraudulent. Upon this report and after a public examination of the debtor, the court will take final action.[5] In Norway and Denmark, as in England, the demand for an adjudication by the court may proceed either from the debtor or from one or more creditors, and the creditors must prove more than mere cessation of payment. They must establish to the satisfaction of the court the

[1] *Statutes 46 and 47 Victoria*, c. 52, § 6.

[2] *Konkursordnung*, § 97.

[3] *Concursordnung*, § 63.

[4] *Annuaire de Législation Étrangère, 1882*, p. 322.

[5] *Statutes 46 and 47 Victoria*, c. 52, §§ 5–17.

existence of certain facts which the law enumerates.[1] Some peculiarities of the laws of the Netherlands and of Portugal may be noted. In the former country, if the debtor who has stopped payment has absconded, leaving his affairs unsettled, or is concealing his property, the public prosecutor may require the declaration of bankruptcy after due hearing or summons of the debtor.[2] In the latter country the demand may not be made by a father as creditor of his son, or *vice versâ;* or by a wife as creditor of her husband; nor may the demand be based upon other than commercial debts.[3] This last provision appears also in Spain[4] and Italy.[5]

It has been the tendency of recent laws to make provision whereby an honest debtor can escape the humiliation of a bankruptcy proceeding by entering into an arrangement or composition with his creditors under the supervision of the court or some public authority, before a judical declaration has issued. These arrangements, known as preventive compositions or compositions before bankruptcy, will be described under another head.

[1] *Bulletin de la Société de Législation Comparée*, 1885, p. 64; loi norvégienne, Art. 1 ff; loi danoise, Art. 40 ff.

[2] *Wetboek van Koophandel*, Art. 768.

[3] *Codigo Commercial*, §§ 1126, 1127.

[4] *Ley de Enjuiciamiento Civil*, Art. 1323.

[5] *Codice di Commercio*, Art. 687.

CHAPTER II. THE EFFECTS OF BANKRUPTCY.

§ 1. *As to the Person and the Juristic Status of the Bankrupt.* The existence of bankruptcy having been judicially declared, certain effects are at once produced upon the person and legal status of the bankrupt, upon his property and upon the acts performed by him.

As to the person, the rule formerly prevailing throughout Europe was that, in certain cases, at least, the bankrupt might be imprisoned. It was so provided in the laws of France,[1] Belgium,[2] Spain,[3] Italy,[4] England,[5] Austria,[6] and Germany.[7] But this rule has been modified, and in some instances abrogated, by the laws relative to arrest for debt passed within recent years. In France, the law of July 22nd, 1867, has abolished arrest for debt (*contrainte par corps*) in civil and commercial matters and against foreigners. In Belgium, the law of July 27th, 1871, likewise abolishes it in civil and commercial cases. The Austrian law of May 4th, 1868, permits the arrest of the debtor only when he is attempting flight. The German law of May 31st, 1868, abolishes arrest as a measure of execution. Before these laws there were two kinds of arrest for debt recognized in Austria and Germany, the one which was a measure of execution (*Executions-mittel*) was intended to force

[1] *Code de Commerce*, Art. 455.

[2] *Loi du 18 avril, 1851*, Art. 467.

[3] *Código de Comercio de 1829*, Art. 1044; *Ley de Enjuiciamiento Civil*, Art. 1335.

[4] *Codice di Commercio*, Art. 695.

[5] *Statutes 32 and 33 Victoria*, c. 71, § 86.

[6] *Concursordnung*, § 98.

[7] *Konkursordnung*, § 98.

a refractory debtor to pay his debt or to induce his relatives or friends to pay it for him; the other, which was a precautionary measure (*Sicherheits-arrest, Vorsichtsweiser Arrest*) was employed by the creditor to prevent the debtor from escaping and from disposing of any part of the property which formed the security of his creditors. As soon as the creditor had taken the necessary measures to prevent the disappearance of the property, the imprisonment of the debtor ceased. In both these countries it is arrest as a measure of execution that has been abolished. The federal statute for Switzerland of May 9th, 1874 (art. 59) pronounces the abolition of arrest for debt without any limitation. In England, the law of August 9th, 1869, provided that debtors owing sums less than £200 in amount might be arrested only in case of fraud or evident bad faith. In 1872 and 1874 attempts were made to secure the complete abolition of arrest for debt, but these attempts failed. Finally Italy by a law of December 6th, 1877 (art. 1–5), has with certain exceptions abolished arrest for debt in civil and commercial matters.

Notwithstanding the law of 1867, there is still in France a kind of arrest employed as a precautionary measure. Article 455 of the Code of Commerce provides that in the decree announcing the bankruptcy the court may order the debtor's person to be lodged in the house of detention for debtors, or may order him into the custody of a police officer. This imprisonment however is only temporary, and provision is made by articles 456 and 457 for the debtor's release if he has within the required time made a correct statement of his affairs and nothing reprehensible has been discovered in his conduct. It has been adjudged that this imprisonment may still be ordered notwithstanding the law of 1867.[1]

As to his legal status, the bankrupt is in general subjected only to a commercial or political incapacity. So in France, he

[1] Arrêt de Montpelier du 11 mars, 1871; Arrêt de rejet de la Chambre des Requêtes du 1er juillet, 1873.

becomes incapable of holding any public office, of sitting on juries, of being a judge of the Tribunal of Commerce, or a member of a *Conseil de Prud'hommes*,[1] or of participating in the election of members to either of these institutions, nor can he become a stock broker nor other broker. He also loses his right to appear in a *Bourse* or Exchange, and will not be allowed to open a discount account with the Bank of France.

England was formerly an exception to the general rule; for in that country no political incapacity whatever resulted save in the case of a member of the House of Commons. If such a person was adjudged bankrupt he remained during one year from the date of the order incapable of sitting and voting in that House, unless within that time either the order was annulled or the creditors who had proven their debts were fully paid. Otherwise the seat of such member would become vacant.[2] But the law of 1883, which is in many respects more stringent than that of 1869, imposes several political disabilities upon all bankrupts. He is disqualified from sitting or voting in the House of Lords or in any committee thereof, or being elected as a peer of Scotland or Ireland, to sit and vote in the House of Lords, being elected to, or sitting, or voting in the House of Commons, or any committee thereof; being appointed or acting as a justice of the peace; being elected to, or holding the office of mayor, alderman, councillor, guardian of the poor, overseer of the poor, member of a sanitary authority, or school board, highway board, burial board, or select vestry.[3]

§ 2. *As to his Property.* In every country the judgment

[1] These are boards of arbitration, whose duty it is to render preliminary decision (subject to an appeal by the litigants to the Tribunals of Commerce) in disputes arising between manufacturers and their foremen, or between the foremen and the workmen. The members are chosen, one-half by the employers and the other half by the men.

[2] *Statutes 32 and 33 Victoria*, c. 71, §§ 121 and 122.

[3] *Statutes 46 and 47 Victoria*, ch. 52, § 32.

declaring the bankruptcy operates to deprive the debtor of the possession and control of his property.[1] In France and other Continental countries, it does not divest the bankrupt of the ownership of his property, but deprives him of all power to manage, sell or transfer it. The right to administer the estate passes to the syndic. The English law is peculiar in that the debtor loses not only the possession but also the legal title, which vests in the trustee and is evidenced by his certificate.[2] In some countries, as in Germany,[3] it is only the property subject to execution which belongs to the debtor at the opening of bankruptcy that is affected; while in others, as in France,[4] Austria,[5] Hungary,[6] Belgium,[7] Spain,[8] Italy,[9] and England[10] property coming to him during the continuance of the proceedings is included in the general mass that is to be administered for the benefit of his creditors. In France, if additional property is acquired by the debtor's own industry, it passes to the syndic; but he must employ it in the payment of debts contracted by the bankrupt in his new business in preference to those due his former creditors. In France and Belgium bankruptcy creates a mortgage of the creditors on all the real property to which the bankrupt is or may become entitled. Its purpose is to make

[1] France, *Code de Commerce*, Art. 443; Belgium, *Loi du 18 avril, 1851*, Art. 444; Italy, *Codice di Commercio*, Art. 699; Spain, *Código de Comercio*, Art. 878; *Código Antiguo*, Art. 1035; Austria, *Concursordnung*, § 1; Germany, *Konkursordnung*, § 107; Hungary, Law of March 27th, 1881, Art. 1; *Annuaire de Législation Étrangère, 1882*, p. 323.

[2] *Statutes 46 and 47 Victoria*, c. 52, § 54.

[3] *Konkursordnung*, § 1.

[4] *Code de Commerce*, Art. 443.

[5] *Concursordnung*, § 1.

[6] Law of March 27, 1881, Art. 1.

[7] *Loi du 18 avril, 1851*, Art. 444,

[8] *Código de Comercio de 1829*, Art. 1037.

[9] *Codice di Commercio*, Art. 699.

[10] *Statutes 46 and 47 Victoria*, c. 52, § 44.

it impossible for the debtor to deal with his realty to the prejudice of his creditors.[1] In England, it should be noted, the estate of the bankrupt divisible among his creditors does not include property held by him in trust for any other person, nor the tools of his trade and the necessary wearing apparel and bedding of himself, his wife and children to a value not exceeding £20; but it comprises all goods being, at the commencement of the bankruptcy, in the possession of the debtor, in his trade or business, by the consent of the true owner, under such circumstances that he is the reputed owner thereof.[2]

As a general rule, claims against the debtor that have not yet arrived at maturity become at once due. This is true in France,[3] Spain,[4] Germany,[5] Italy[6] and Hungary.[7] In Austria, we find a modification of this rule. It is there left to the discretion of the syndic whether such a claim shall be paid immediately or not until maturity. The option thus given is to be exercised by the syndic for the best interests of all the creditors.[8] This seems also to be the meaning of the laws of Denmark and Norway, which say that debts not yet matured are considered due in the sense that the estate has the right to pay them immediately (a discount being made), and the creditor is obliged to receive the payment.[9]

Another question is presented when we ask whether in the case above mentioned a creditor shall receive the full amount

[1] France, *Code de Commerce*, Art. 490: Belgium, *Loi du 18 avril, 1851*, Art. 487.

[2] *Statutes 46 and 47 Victoria*, c. 52, § 44.

[3] *Code de Commerce*, Art. 444.

[4] *Código de Comercio*, Art. 883; *Código Antiguo*, Art. 1043.

[5] *Konkursordnung*, § 58.

[6] *Codice di Commercio*, Art. 701, 768.

[7] Law of March 27, 1881, Art. 14.

[8] *Concursordnung*, § 14.

[9] *Bulletin de la Société de Législation Comparée*, 1885, p. 68; loi danoise, Art. 14, 131; loi norvégienne, Art. 102.

of his debt; or whether a discount shall be made when it is paid before maturity. Three answers have been given: (1) That the creditors whose claims have not matured share in the assets without making any allowance for *interusurium* or rebate of interest. Such is the construction put upon the law in France,[1] and the reason given is that the possible loss to the other creditors by such a practice is more than compensated by the advantages to be derived from a rapid termination of the bankruptcy.[2] In Austria, likewise, when the syndic has decided to pay a debt immediately, the creditor receives the full amount of the debt without discount.[3] (2) That a claim which has in this way become payable before maturity shall be estimated at its present worth, that is to say, at the sum which put at legal interest will produce at the day of maturity a sum equal to the full amount of the claim. The time at which the present worth shall be estimated may be either the date of the payment of the claim, as in Italy, Spain, Hungary and England, or the date of the opening of the bankruptcy, which is the prevailing rule. This is the answer given by the laws of Spain,[4] Italy,[5] Germany,[6] Hungary,[7] and England.[8] (3) That a discount shall be made only when the debt has a long term to run before it arrives at maturity. In the Netherlands, the deduction is made only in case the term equals or exceeds three years;[9] while the law of Belgium (Art. 450), provides that debts not due and not bearing interest, of which the term would be shortened by more than a year, shall suffer a deduction of the

[1] *Code de Commerce*, Art. 444.

[2] Goirand, *Commentary on the French Code of Commerce*, p. 357.

[3] *Concursordnung*, § 14.

[4] *Código de Comercio*, Art. 883; *Código Antiguo*, Art. 1043.

[5] *Codice di Commercio*, Art. 701–768.

[6] *Konkursordnung*, § 58.

[7] Law of March 27th, 1881, Art. 14.

[8] *Statutes 46 and 47 Victoria*, c. 52. Second Schedule, § 21.

[9] *Wetboek van Koophandel*, § 778.

legal interest reckoned from the date of the declarative judgment of bankruptcy to that of maturity.

The French method of paying a debt not yet due without making a discount would seem both unjust and illogical; unjust, because it permits the creditor to benefit by the bankruptcy of his debtor; and illogical, because it is in effect paying a debt before maturity with future interest, although another section of the code says that the declaration of bankruptcy stops interest on all unsecured debts. (Art. 445.)

By the decree of bankruptcy in nearly all countries the running of interest is stayed on all debts not guaranteed by privilege, mortgage or other security, at least so far as the estate is concerned. But in France the bankrupt remains liable for such interest, and cannot obtain his rehabilitation until he has paid it in full.[1] No similar provision is found in the Code of the Netherlands; and Austria has adopted a different rule. If interest has already commenced to run, its course will not be arrested. If there has been no express stipulation for interest, the production of the claim for admission in the bankruptcy is sufficient to put the debtor in default and set the interest running. If there has been an express stipulation that interest shall begin from a future date, it will not run, of course, until that day arrives.[2] The Austrian rule favors individual creditors, but does not subserve the interests of the entire body.

Concerning the legal proceedings already commenced against the debtor by individual creditors, the general rule is that they are stayed, and the ordinary method of obtaining and enforcing judgments must yield to the special procedure of bankruptcy. Two questions need to be considered: first, the fate of pending lawsuits, and second, that of measures of execution commenced but not completed at the time of the opening of bankruptcy.

[1] Italy, *Codice di Commercio*, Art. 700; Germany, *Konkursordnung*, § 56 (1); Spain, *Código de Comercio*, Art. 884.

[2] *Concursordnung*, § 17; *Bürgerlichcs Gesetzbuch*, §§ 1333, 1334.

On this first point the French Code is not very satisfactory. It says that from the date of the judgment all actions relating to realty or personalty must be brought by or against the syndics (Art. 443), and furthermore, that creditors who are not mortgagees cannot proceed to sell the real property of the debtor after the date of the declaration of bankruptcy. (Art. 571). It is not clear from these provisions what is to be done with the actions already commenced, but it is to be presumed that they will be discontinued and the creditor required to produce his claim for admission in the bankruptcy proceedings. If his claim is then contested the course to be followed is prescribed. (Art. 498 ff). This is plainly the rule in Austria, where the law says that actions which are pending in first instance at the opening of bankruptcy are interrupted, even though they are ready for decision. If the claim is contested when presented in the bankruptcy, proceedings will be resumed in the competent court (*Concursgericht*). Another question which remains somewhat doubtful in France is answered here. If the case has already been decided in a lower court, appeal may be taken to the superior court in the usual way. The proceedings are interrupted only in so far that the syndic—or, if the claim has been presented and contested in the bankruptcy, the contesting creditors—must be substituted for the debtor as parties to the action.[1] In Germany suits commenced against the debtor are interrupted in the same sense: they may be carried on against the syndic. When their effect, if successful, would be to take single articles out of the estate and give the plaintiffs prior satisfaction as compared with other creditors, they can be carried on only against the syndic.[2] In Denmark, such actions may be continued in the court in which they are pending, but the syndic must be substituted for the debtor as defendant.[3]

[1] *Concursordnung*, § 7.

[2] *Civilprozessordnung*, § 218; *Konkursordnung*, § 8, 9.

[3] Law of March 25, 1872, Art. 8; *Bulletin de la Société de Législation Comparée*, 1885, p. 67.

What shall be the effect of the opening of bankruptcy upon executions not yet completed is not of much importance in France, since by French law a creditor does not gain a priority over less vigilant creditors by being the first to seize a debtor's property. The proceeds from the sale are divided proportionally among all the creditors who give notice of their claims before the money is paid over to the creditor in whose favor the execution issued.[1]

In Germany attachments and executions cannot be commenced nor continued in favor of individual creditors during the bankruptcy proceedings; but if at the opening of bankruptcy the attachment (*Pfändung*) is complete, the creditor acquires, as to that property, the rights of a pledgee.[2] In other words, he may satisfy his claim by selling the property independently of the bankruptcy procedure.[3] Furthermore, a right of pledge acquired by an earlier attachment takes priority over one secured at a later period.[4] The effect of a seizure of real property is left undetermined by the Imperial Code of Procedure,[5] to be governed by the laws of the several states. The Austrian law[6] does not differ from the German. In Belgium, the decree of bankruptcy stays all attachment proceedings instituted by individual creditors, even when the day of the execution sale has been fixed and published before the decree issues. In such case, the sale will be made for the benefit of the entire body of creditors. Nevertheless, in certain cases where the interest of the creditors demands it, the syndics may

[1] *Code de Procédure*, Art. 656 ff.

[2] *Pfändung* is execution by attachment of movables. The attachment is complete when the executive officer of the court has seized and taken the things into his possession. *Civilprozessordnung*, §§ 709, 712.

[3] *Konkursordnung*, § 41 (9).

[4] *Civilprozessordnung*, § 709.

[5] *Ibid*, § 757.

[6] *Concursordnung*, §§ 11, 12 (2).

obtain from the court the postponement of the sale.[1] The same rule obtains in the Netherlands.[2]

In England the rights of individual creditors are still more restricted. The law says:

"Where a creditor has issued execution against the goods or lands of a debtor, or has attached any debt due to him, he shall not be entitled to retain the benefit of the execution or attachment against the trustee in bankruptcy of the debtor, unless he has completed the execution or attachment before the date of the receiving order, and before notice of the presentation of any bankruptcy petition by or against the debtor, or the commission of any available act of bankruptcy by the debtor."[3]

If goods of the debtor have been taken in execution, and before the sale the sheriff receives notice that a receiving order has been made, he must deliver the goods to the official receiver or trustee. The costs of the execution will remain a charge on the goods. In any case where goods have been sold under an execution to satisfy a judgment for more than £20, the sheriff, after deducting the costs of execution, is to retain the balance of the proceeds for fourteen days, and if during that time he receives notice that a bankruptcy petition has been presented by or against the debtor, and an adjudication follows, he is to pay this balance to the trustee in bankruptcy.[4]

To recapitulate. In France the law does not reward the most vigilant creditor if the others put in their claims before the proceeds from the sale have been paid over. In Germany and Austria the attaching creditor will secure a preference if the attachment has been completed by seizure. In Belgium and the Netherlands the proceedings will be stayed in the interest of all the creditors unless the sale has been completed.

[1] *Loi du 18 avril*, 1851, Art. 453.

[2] *Wetboek van Koophandel*, §§ 771, 772.

[3] *Statutes 46 and 47 Victoria*, c. 52, § 45.

[4] *Ibid.*, § 46.

In England, under certain circumstances, the attaching creditor will not be permitted to retain the benefit of the execution even though completed by sale at the time the bankruptcy is opened.

§ 3. *As to the Acts performed by him.* It seldom, if ever, happens that the transition from solvency to insolvency is clear and marked. There is usually a period of varying duration in which the storm has been gathering. To avert the impending wreck the embarrassed debtor may have resorted to various expedients, and it becomes necessary to determine what acts shall stand and what shall be annulled as prejudicial to his creditors.

For fraudulent alienations and acquittances the Romans provided the *actio Pauliana* which has survived in some of the modern codes.[1] We find in the Institutes of Justinian that if a man has delivered anything to a third person in fraud of creditors, the latter, after they have obtained possession of his goods under a decree of the president of the province, are allowed to rescind the delivery and to demand the thing; that is, to allege that the thing has not been delivered, and, therefore, has remained among the debtor's goods.[2] An alienation in fraud of creditors comprehended any act or forbearance by which a debtor diminished the amount of his property divisible among his creditors, but not a forbearance by which a debtor merely failed to add to his property.[3] The mere payment of a debt was not a subtraction from the assets of the debtor within the meaning of the edict, unless the object of the payment was to give a fraudulent preference to one of the creditors.[4] It was also necessary that the alienation should have been made with the intention of diminishing the assets available for the

[1] *Digest*, 42, 8; *Code Civil des Français*, Art. 1167.

[2] *Institutes*, 4, 6, 6.

[3] *Digest*, 50, 17, 134, pr.

[4] *Digest*, 42, 8, 6, 7; 42, 8, 24; 42, 5, 6, 2.

creditors.[1] This intention was presumed to exist when the debtor knew himself to be insolvent, or knew that the alienation would render him insolvent.[2] If the alienation or acquittance was made without valuable consideration, it was rescinded even though the person in whose favor it was made was innocent of the fraud; but if it was for valuable consideration, it would stand unless the third party knew it was in fraud of the creditors.[3] An innocent purchaser from the fraudulent purchaser could not be ousted.[4]

The Italian cities inaugurated in the middle ages a system of great rigor. They established what is known as the "suspicious period," that is to say a period preceding actual insolvency, of which the duration varied in the different cities from two days to a month. During this time, the acts of the debtor were deemed fraudulent, and it was unnecessary for the party seeking to annul them to prove an intention to injure the creditors.

The modern bankrupt laws have generally preserved this "suspicious period" in various forms; and in determining what acts shall be voidable they have given an extensive application to the principles of the Roman law, already mentioned.

As regards the first point, in most countries the commencement of insolvency may relate back to a time anterior to its judicial declaration. It is so in France, Belgium, Italy, Spain, and the Netherlands. In France,[5] and Belgium[6] the tribunal either of its own motion or on application of any party interested, fixes the date at which the cessation of payments shall be deemed to have taken place. In the absence of such

[1] *Digest*, 50, 17, 79; and 42, 8, 1, pr. and 10, pr.

[2] *Digest*, 42, 8, 17, 1.

[3] *Digest*, 42, 8, 6, 8; *Codex*, 7, 75, 5.

[4] *Digest*, 42, 8, 9.

[5] *Code de Commerce.* Art. 441.

[6] *Loi du 18 avril*, 1851, Art. 442.

special determination it is considered as having taken place at the date of the declarative judgment. In Belgium, it is to be noted, however, that the tribunal is not allowed to go back more than six months in selecting this date. In Italy,[1] in fixing the date of the cessation of payment, the court is not permitted to go back more than three years from the adjudication. In England[2] the bankruptcy is deemed to have commenced from the "act of bankruptcy" upon which the petition is founded, or the earliest one that is proved to have been committed within three months before the petition is presented. In the Netherlands[3] it dates from the day of the debtor's declaration, from the day of the presentment of the creditor's petition, or from that of the public prosecutor's requisition. In Norway and Denmark, it is regarded as having commenced from the day when the petition was presented to the court if the petition emanates from the debtor himself, but from the day of the adjudication if the bankruptcy has been pronounced at the request of a creditor.[4] In Germany and Austria, the laws do not expressly say that the bankruptcy shall have relation back, but, as we shall see, they provide that many acts which have preceded the formal declaration may be annulled on various grounds.

Concerning the second point, the rules governing the validity of acts done within this suspicious period, these have been prescribed by the Legislatures with such minuteness and with so many variations in detail that it is difficult to reduce them to a system. Speaking very generally we may say that the acts which may be annulled in the interest of the estate are those done in bad faith, although for a valuable consideration; those done for no valuable consideration, although in a few cases the presumption of bad faith raised against gratuitous acts is al-

[1] *Codice di Commercio*, Art. 704.

[2] *Statutes 46 and 47 Victoria*, c. 52, § 43.

[3] *Wetboek van Koophandel*, § 769.

[4] *Bulletin de la Société de Législation Comparée*, p. 66.

lowed to be rebutted, and finally those of an equivocal character that are presumed to have been done to favor certain creditors to the prejudice of others, such as the payment of a debt before it is due, or in an unusual manner, or the granting of a security for a debt previously contracted. We shall consider these laws *seriatim*.

It is a principle of the French law,[1] derived from the Romans, that creditors may attack acts done by debtor in fraud of their rights, but to do so a creditor must prove that the act was prejudicial to him, and if it was done for a valuable consideration that there was collusion between his debtor and the third party. Since fraud is so difficult to prove, it is clear that if this were the only principle applied to cases of bankruptcy it would be impossible to overthrow many acts by which the estate has been seriously damaged. The Code of Commerce has therefore enumerated certain acts that may be annulled. These are as follows: (1) Payment of debts that have fallen due, and, in general, all acts for a valuable consideration performed in the interval between the cessation of payments and the adjudication of bankruptcy, provided, however, that they have taken place with a knowledge on the part of the third party of the cessation of payments.[2] Annulment in this case is discretionary with the tribunal, and all the circumstances may be considered and the act upheld if it appears to the tribunal that the third party was neither imprudent nor guilty of bad faith. (2) Payments of bills of exchange between the date fixed as that of the cessation of payments and the adjudication. The action can be brought only against the person for whose account the bill has been drawn, that is, the drawer. In the case of a promissory note the action can be brought only against the first endorser. In either case it must be proved that the party of whom restitution is demanded knew of the debtor's cessation of payments at the time he put the paper into circula-

[1] *Code Civil*, Art. 1167.

[2] *Code de Commerce*, Art. 447.

tion. The reason of the rule forbidding an action to be brought against a holder who has received payment at maturity is obvious, for had he refused it he could not have protested the paper, and his recourse against the subsequent endorsers would have been lost. Where the holder has received payment after maturity, with knowledge of the condition of affairs, the rule no longer applies.[1] (3) All conveyances of realty or personalty without valuable consideration, and the following acts that disclose the debtor's embarrassments, *viz.*, payments of debts not yet due, payments of debts due otherwise than in cash or commercial paper, and finally all *hypothèques judiciaires* or *hypothèques conventionnelles*, and all *antichrèses* or *nantissements mobiliers*[2] of the debtor for debts previously contracted. In all these last mentioned cases the suspicious period comprises the interval between the cessation of payment and the adjudication and the ten days preceding, and the necessary conditions being present the annulment is not discretionary with the tribunal, but is decreed regardless of the third party's knowledge or ignorance of the debtor's embarrassments.[3] Finally it is to be mentioned that mortgages and privileges validly acquired may be registered up to the date of the adjudication, but all registrations made after the cessation of payments, or within ten days previous thereto, may be annulled in the discretion of the tribunal if more than fifteen days have elapsed between the ex-

[1] *Ibid*, Art. 449.

[2] *Hypothèque judiciaire* is the lien that attaches to the real estate of the party in a suit against whom a judgment is rendered. This lien affects not only all realty of which the party is seized at the time when the judgment is rendered, but also all that may come to him at any time before the judgment is satisfied. *Hypothèque conventionnelle* is a mortgage resulting from an agreement, deed or contract.

Antichrèse is an agreement in accordance with which a debtor transfers real property to his creditor with power to receive the income therefrom until the debt is paid.

Nantissement mobilier is a pledge of personalty as a security for debt.

[3] *Code de Commerce*, Art. 446.

ecution of the deed of mortgage or privilege and the registration.[1] Delay in making the registration until the debtor has become involved enables him to maintain an apparent credit, and is therefore regarded as a badge of fraud.

The Belgian law[2] is a copy of the French. In addition to gratuitous conveyances it declares null also all acts, operations, or contracts for a valuable consideration, if the value with which the insolvent has parted exceeds considerably that which he has received in return (Art. 445); and it expressly states that all acts or payments in fraud of creditors are null, at whatever date they may have taken place (Art. 448).

In Spain, the suspicious period varies according to the nature of the acts. It is fifteen days previous to the declaration of bankruptcy for payments of debts that become due subsequently thereto.[3] It is thirty days for the following classes of acts: Conveyances of immovables for no valuable consideration, dotal gifts made to the debtor's daughters, transfers of immovables in payment of debts not due at the time of the adjudication, mortgages or pledges to secure debts previously contracted,[4] gifts *inter vivos* made since the last inventory was drawn up, if the latter shows liabilities in excess of the assets.[5] There are enumerated also, certain acts which may be annulled in the interests of the estate if done within periods ranging from ten days to two years, provided it is proved that the debtor intended to defraud his creditors.[6] It is not clear whether the intention must have been shared by the party in whose favor the act was done.

In the Netherlands, the suspicious period also varies. All payments of debts not yet due at the commencement of the

[1] *Ibid.*, Art. 448.

[2] *Loi du 18 avril*, 1851, Art. 445–449.

[3] *Código de Comercio*, Art. 879; *Código Antiguo*, Art. 1038.

[4] *Código de Comercio*, Art. 880; *Código Antiguo*, Art. 1039.

[5] *Código de Comercio*, Art. 880; *Código Antiguo*, Art. 1040.

[6] *Código de Comercio*, Art. 881, 882; *Código de Antiguo*, Art. 1041, 1042.

bankruptcy are restored to the estate, if they have been made by the debtor within forty days before the date which is taken as the opening of bankruptcy.[1] Pledges and mortgages are null if granted by the debtor within forty days before the commencement of bankruptcy, if they have been given to secure obligations contracted before that time, or within that time, but not simultaneously with the giving of the security. All gifts of realty or personalty made within sixty days are void, even though the parties acted in good faith, and the time is doubled if the donee is related to the donor by blood or marriage, in the ascending or descending line indefinitely, or in the collateral line to the fourth degree inclusive.[2] Without regard to the time of the act, all gifts are voidable if it is proved that the donor knew of his embarrassments, although the donee was in good faith; and all transactions for valuable consideration, if it is proved *both* parties intended to defraud the creditors.[3] This latter provision is simply a repetition of the conditions necessary to sustain the *actio Pauliana.*

Both Germany and Austria, in their legislation upon the annulment of the acts of a debtor to prevent injury to his creditors, have provided separately for the case of bankruptcy and for all other cases.[4]

In Germany all fraudulent acts of the debtor—that is, acts done with the intention of injuring his creditors—may be attacked (*sind anfechtbar*) at whatever time they have taken place, provided it can be proved that this intention was known

[1] *Wetboek van Koophandel*, § 769.

[2] *Ibid.*, §§ 773–775.

[3] *Ibid.*, §§ 776–777.

[4] Germany: *Konkursordnung*, §§ 22–34; und Gesetz betreffend die Anfechtung von Rechtshandlungen eines Schuldners ausserhalb des Konkursverfahrens vom 21 Juli, 1879. Austria: Gesetz vom 16 März, über die Anfechtung von Rechtshandlungen, welche das Vermögen eines zahlungsunfähigen Schuldners betreffen. *Reichsgesetzblatt*, 25 März, 1884; *Annuaire de Législation Étrangère*, 1885, p. 289.

to the third party.[1] The wording of this section is general enough to include gifts. The requirement then of proof of knowledge of the third party even when the act is gratuitous is a departure from the principles of the *actio Pauliana*. Among acts regarded as fraudulent are enumerated: contracts for a valuable consideration, concluded during the year preceding the opening of the procedure with the spouse, either before or during the marriage, or with relatives by blood or marriage to certain specified degrees, provided the contract has injured the creditors, and the other party does not prove that the intention of the debtor to injure his creditors was unknown to him at the time the contract was concluded;[2] acts for no valuable consideration within the preceding year, not including customary and occasional gifts (*gebräuchliche Gelegenheitsgeschenke*); all gratuitous acts within the last two years in favor of the wife, as well as any return made, or security given for the return, within the same period, of a marriage portion or property of the wife legally within the debtor's control, unless he is obliged so to do by law or by a contract previously concluded.[3] In the last two cases proof by the third party of ignorance or good faith is of no avail.

The Austrian law[4] is substantially the same as the German, but we note two important exceptions. In the first place, acts done with an intention, known to the other party, to injure the creditors, may be attacked if they have taken place within the last *ten* years;[5] and in the second place gifts and securities in favor of the wife as already mentioned may be assailed if they have been given within *one* year instead of two years, as in Germany.[6]

[1] *Konkursordnung*, § 24 (1).

[2] *Ibid.*, § 24 (2).

[3] *Ibid.*, § 25.

[4] Gesetz vom 25 März, 1884, Art. 1–3, 28–30.

[5] *Ibid.*, Art. 2 (1).

[6] *Ibid.*, Art. 3. b. d.

The foregoing provisions are common to both bankruptcy and other modes of liquidation. In the following cases the acts of a debtor are subject to attack only in case he becomes a bankrupt. In Germany, acts subsequent to the cessation of payments or the petition for the opening of bankruptcy are voidable, provided either of these facts was known to the other party at the time the act was done, and provided the act was injurious to the creditors. To be regarded as injurious, it must have diminished the amount of property divisible among the creditors.[1] In the same way are treated acts following the cessation of payment or the petition which give to a creditor security or payment if at the time the act was done these facts were known to the creditor. It is probable that payments made when the debtor alone knew of his insolvency are valid. By the Roman law, it will be remembered, the payment of a debt was not a subtraction from the assets of the debtor, and the act could not be attacked unless the object was to give a fraudulent preference to one of the creditors.[2]

In Germany, no provision is made, as in most Continental countries, for the naming by the court, in its adjudication or subsequently, of a fixed day to be taken as that of the cessation of payments, but it is declared that acts cannot be attacked on the ground of a knowledge of a stoppage of payment, if they have occurred more than six months before the opening of the procedure.[3] This is also true in Austria, when the debtor is a trader,[4] but in all other cases we note a divergence from the German law. A fixed term of six months preceding the opening of bankruptcy is made the suspicious period when circumstances are such that the third party ought to recognize in the

[1] *Konkursordnung*, § 23, Anmerkung, 4.

[2] *Digest*, 42, 5, 6, 2; 42, 8, 24. The Roman maxim was: "Nihil dolo creditor facit qui suum recipit." *Digest*, 50, 17, 129.

[3] *Konkursordnung*, § 26.

[4] Gesetz vom 25 März, 1884, Art. 9, 10.

transaction an impoverishment of his debtor likely to prove injurious to the latter's creditors.[1]

To return to Germany: for securities given or payments made, to which the creditor was not legally entitled, or at least not in that manner or at that time, a different rule obtains. They are voidable if they have taken place after the cessation of payment or the petition for an adjudication, or within the ten days preceding. But the German differs from the French law in permitting the defendant in the action to prove that at the time of the transaction he was unacquainted with either of these facts, and was unaware of an intention of the debtor to favor him at the expense of the other creditors.[2] In Austria, these same acts may be overthrown if they have occurred since the cessation of payment or the petition, or within the two weeks prior to either of these events, provided that the time anterior to the opening of bankruptcy does not exceed one year; and, as in Germany, the presumption of knowledge on the part of the third party may be rebutted. But this applies only to traders.[3]

Where bills of exchange or promissory notes have been paid by the debtor after the cessation of payment or the petition, the law is the same in Germany[4] and Austria[5] as in France. The wording of the German law is that recovery may be had only from the last *Wechselregressschuldner*, that is, the person who would stand last in the order of recourse, if the debtor had failed to pay and the paper had gone to protest.[6]

The right to attack these acts of the debtor in the interest

[1] *Ibid.*, Art. 4.

[2] *Konkursordnung*, § 23 (2).

[3] Gesetz vom 25 März, 1884, Art. 5.

[4] *Konkursordnung*, § 27.

[5] Gesetz vom 25 März, 1884, Art. 8, 22.

[6] *Konkursordnung*, § 27, Anmerkung, 2.

of the creditors is exercised by the syndic,[1] and the action must be brought within one year.[2] Restitution must be made to the estate of whatever has been alienated, given away or surrendered by the voidable act, but when the third party has parted with no valuable consideration and acted in good faith, he is chargeable only with the amount by which he has been enriched.[3]

The Italian Code of 1882 seems to have established two periods of suspicion: the first, a period of ten days anterior to the declaration of bankruptcy, and the second, the interval between the cessation of payment and the declaration. Acts of all kinds done within the first period are presumed to be fraudulent unless the contrary is proved.[4] Those which are null if done within the second period are as follows: 1. Acts for no valuable consideration, and payments of debts not due.[5] 2. Acts for a valuable consideration, such as payments and sales, if it is proved that the third party knew at the time, the condition of the debtor's affairs. Here the presumption of fraud may be rebutted; but if the consideration furnished by the third party is inadequate, the presumption of fraud is strengthened.[6] 3. Finally, regardless of the ignorance of the third party, payments made otherwise than in cash or commercial paper, and pledges and mortgages given by the debtor, may be annulled if the presumption of fraud is not rebutted.[7] It is also provided by the Civil Code and re-affirmed by the

[1] Germany, *Konkursordnung*, § 29; Austria, Gesetz vom 25 März, 1884, Art. 16. The Austrian law makes one exception, *viz.*, in favor of creditors who have liens upon certain kinds of property. In Germany such creditors have only the right of intervention in the action brought by the syndic, *Civilprocessordnung*, § 63.

[2] Germany, *Ibid.*, § 34; Austria, *Ibid.*, Art. 27.

[3] Germany, *Ibid.*, § 30; Austria, *Ibid.*, Art. 19.

[4] *Codice di Commercio*, Art. 709.

[5] *Ibid.*, Art. 707, 1°, 2°.

[6] *Ibid.*, Art., 709, 1°, 2°.

[7] *Ibid.*, Art. 709, 3°, 4°.

Code of Commerce, that all acts, payments and alienations in fraud of creditors, at whatever time they may have taken place, are voidable.[1]

The English law is aimed against all voluntary conveyances and preferences given to one creditor over the others, while it seeks to protect *bona fide* transactions without notice. Voluntary conveyances of property, excluding thereby conveyances made in consideration of marriage, or in favor of a purchaser in good faith and for valuable consideration, or in favor of wife or children of property accruing to the conveyor after marriage in right of his wife, are void as against the trustee in bankruptcy, if the conveyor becomes bankrupt within two years after the date of the conveyance, or if he becomes bankrupt at any time within ten years thereafter, unless in this latter case it is proved that at the time of the conveyance the conveyor was solvent and able to pay all his debts without the aid of this property. Void as against the trustee is also any contract made in consideration of marriage for the future conveyance to wife or children of property in which at the time of the marriage the man had no interest, and not being property in right of his wife, if he become bankrupt before the property is actually transferred. All conveyances of property, or charges made thereon, payments, obligations incurred, and judicial proceedings taken or suffered, with a view to give a creditor a preference, are deemed fraudulent and void if bankruptcy results from a petition presented within three months of the date of any of these transactions. Subject to the foregoing any payment by the bankrupt to any of his creditors, any payment or delivery to him, and all conveyances and other acts for a valuable consideration, are valid if they occur before the date of the "receiving order," and the third party has no notice of any available act of bankruptcy previously committed.[2]

[1] *Codice Civile*, Art. 1235; *Codice di Commercio*, Art. 708.

[2] *Statutes 46 and 47 Victoria*, c. 52, § 49.

The enumeration given in the Danish law illustrates very well the nature of acts which favor one creditor at the expense of others, and which are voidable for this reason. Among these acts are abnormal payment, that is, otherwise than in money or commercial paper; normal payment of a debt not yet due; the giving of security for debts previously contracted; executions levied by virtue of an agreement between the debtor and creditor; judgments obtained in suits brought within the suspicious period, and judgments obtained through concessions in procedure made by the debtor within the suspicious period. In Denmark a third party dealing with the debtor may rebut the presumption of bad faith which the law raises against him by proving that he was ignorant of the debtor's insolvency. In this respect the Danish law differs notably from the otherwise closely allied Norwegian law and from most other systems, where, if the other conditions are present, the presumption of bad faith is generally conclusive.[1]

[1] *Bulletin de la Société de Législation Comparée*, 1885, p. 71; loi danoise, Art. 22, 23.

CHAPTER III. THE OPERATIONS OF BANKRUPTCY.

§ 1. *The Organs of Bankruptcy.* The adjudication of bankruptcy, as we have seen, deprives the debtor of the management of his property, stays the individual actions of his creditors as well as the running of interest, matures claims not yet due, and renders certain acts of the debtor voidable. It is necessary, therefore, that instrumentalities be established by which the conduct of the bankrupt can be investigated and his estate administered in the interests of his creditors, so as to procure for each the satisfaction due him according to the nature and amount of his claim, and the value of the estate surrendered by the debtor to his creditors.

We find in all countries the administration of the estate entrusted to persons known as syndics, curators, administrators, or trustees in bankruptcy, as the case may be. These syndics act under the immediate direction either of a judge-commissary[1] or some corresponding officer, who is usually a member of the court, or else of a committee of the creditors, according as the policy of the law is to grant the preponderance of control over the administration to the court or to the creditors. There also appears everywhere a general assembly of all the creditors, whose functions vary somewhat in the different countries. Finally, as the chief organ of the system, stands the court having jurisdiction in bankruptcy. It is the duty of the court to exercise a general supervision, make the necessary appointments, and hear appeals.

In France[2] the judgment declaring the bankruptcy appoints a member of the Tribunal of Commerce as judge-commissary,

[1] In France, *juge-commissaire*; Spain, *juez comisario*; Italy, *giudice delegato*.

[2] *Code de Commerce*, Art. 451, 452.

whose duty it is to superintend the syndics and make a report to the tribunal in regard to all disputes arising out of the proceedings, which come within its jurisdiction. Orders made by the judge-commissary can be appealed from only in the cases provided by law. Such appeals lie to the Tribunal of Commerce. The latter can at any time replace the judge-commissary by another of its members. In case of complaints respecting the acts of syndics, the judge commissary must adjudicate upon them, but an appeal from his decision can be taken to the tribunal. Pending this appeal, nevertheless, his decision must be provisionally executed.[1] He can at the request of the bankrupt, of the creditors, or of his own accord, propose the dismissal of a syndic. If he does not attend within a certain time (eight days) to the petitions addressed to him, the same can be tendered to the Tribunal, which, sitting in *chambre du conseil*,[2] will receive the report of the judge-commissary, and the explanations of the syndic, and render a decision thereupon.[3]

The codes of Italy,[4] Spain[5], Belgium[6] and the Netherlands[7] provide for a judge-commissary, who performs functions similar to those with which he is invested by the French code. In Austria this official also exists, and his duties are much more extensive than in France.[8] He is appointed no longer, as formerly, by the Court, but by the President, who appoints him specially for each bankruptcy, or at the beginning of each year, for all the bankruptcies that may arise during that year.[9]

[1] *Ibid.*, Art. 466.

[2] The room to which the court retire for deliberation.

[3] *Ibid.*, Art. 467.

[4] *Codice di Commercio*, Art. 691, 713, 727–732.

[5] *Código de Comercio de 1829*, Art. 1044; *Ley de Enjuiciamiento Civil*, Art. 1333.

[6] *Loi du 18 avril, 1851*, Art. 466.

[7] *Wetboek van Koophandel*, § 787 (1).

[8] *Concursordnung*, § 70 ff.

[9] Gesetz vom 5 Mai, 1873, Art. 133.

In Hungary, the Commissioner in Bankruptcy, corresponding to the French *juge-commissaire* is appointed by the court, and may be chosen either from its own members, or, in bankruptcies of less importance, from among certain functionaries qualified to exercise the powers of judges.[1]

By the Danish and Norwegian laws it is the court of first instance (*Skifteret*), in which but a single judge sits, that exercises functions corresponding somewhat to those of a judge-commissary. It is its duty to take various precautionary measures, for example, to publish in the papers the declaration of the bankruptcy, the notice of the time for choosing the provisional administrator or syndic, and for the general meeting of creditors. It presides at this meeting, and determines what creditors may participate in the vote before the claims are verified. In exceptional cases in Denmark, and regularly in Norway, it appoints the provisional administrator. It calls meetings of the creditors at the request of the debtor, of the curator (as the final syndic is called), of the committee of creditors, or of its own accord. Without taking an active part in the administration after the provisional stage is past,[2] it nevertheless settles the questions of law that may arise, and acts as arbiter between the several creditors or between the committee and the curator, unless in the last case it prefers to call a general assembly of the creditors. When the management of the estate is entrusted to several administrators, the assembly of creditors may, at their own discretion, decide that there shall be no committee of creditors, in which case its rôle is performed by the *skifteret*. Finally, there are certain acts of the curators that require its consent, in case the committee of the creditors refuse their approval.[3]

[1] Law of March 27th, 1881, Art. 93; *Annuaire de Législation Etrangère*, 1882, p. 329.

[2] In Denmark and Norway, bankruptcy proceedings are divided into two stages, the *provisional* ending with the failure to obtain a composition, and the *final* ending with the last division of the assets.

[3] *Bulletin de la Société de Législation Comparée*, 1885, p. 76; loi danoise, Art. 75; loi norvégienne, Art. 27.

The Germans have no need of a judge-commissary, because such duties as would be accorded him can be performed by the court of first instance (*Amtsgericht*) in which at any one time there is but a single judge sitting.[1] The English have also dispensed with a magistrate corresponding to a judge-commissary, but appeal may be taken from any act of the "trustee" to the Court of Bankruptcy, and the court may confirm, reverse, or modify the act in question.[2]

In countries like Germany, England, Norway and Denmark, where the basic principle of the law has been to secure to the creditors the greater measure of control over the administration of the debtor's estate, the immediate supervision over the administrator (*Verwalter*) or trustee is vested solely in a committee chosen by the general assembly of creditors, usually from among their own number. In England, if the assembly fails to choose this committee, its duties are discharged by the Board of Trade.[3]

Other countries, as for instance Austria, Hungary and Italy by its new code, while retaining the immediate control of the court in the person of the commissioner or judge-delegate, as the case may be, have placed beside this functionary, a committee to represent more directly the interests of the creditors.

Finally, in another group of countries (France, Spain, Belgium and the Netherlands) such a committee is unknown, although in France, where they have suffered much from the inefficiency and misconduct of the syndics, the establishment of a committee guaranteeing to the creditors a more effective control has been warmly urged. We shall consider a little more in detail the powers and duties of this committee.

In Germany, the decree of bankruptcy fixes a day not more than one month distant for the election of the committee.[4]

[1] *Gerichtsverfassungsgesetz*, § 22.
[2] *Statutes 46 and 47 Victoria*, c. 52, § 90.
[3] *Statutes 46 and 47 Victoria*, c. 52, § 22 (9).
[4] *Konkursordnung*, § 102.

The creditors are notified by the clerk of the court. The court may, if it seems advisable, appoint a temporary committee from among the creditors or their proxies to act during the interval preceding the first meeting of the creditors.[1] In this meeting they appoint a committee charged with aiding and superintending the administrator,[2] and responsible, as he is, for *culpa levis*. Its members are reimbursed for their necessary expenditures, and are compensated for their services.[3] It is composed of at least three members, a majority of the entire number constituting a quorum, and the concurrence of a majority of those participating is required for the validity of its acts. The committee may acquaint itself with the manner in which the administrator is executing his duties by inspecting his books and papers, is entitled to demand from him a report, is obliged to undertake, at least once a month, an examination of funds in his hands,[4] and may apply to the court for his removal.[5] In case no action has been taken by the general assembly of the creditors, it must determine upon the continuance or discontinuance of the debtor's business, and the mode of investing the funds. Its consent is also necessary to the allowance made by the administrator to the debtor for the support of himself and family,[6] and for many other acts of the administrator, for example, the alienation of movables other than those comprised within the stock in trade when the business is to be continued; the sale of the immovables, or of the entire business or the right to the income therefrom; borrowing money, assuming obligations of third parties, pledging articles belonging to the estate, purchasing real estate at auction, *etc.* There is another class of acts for which the consent of the

[1] *Ibid.*, § 103.
[2] *Ibid.*, §§ 79, 80, 81.
[3] *Ibid.*, § 83.
[4] *Ibid.*, § 80.
[5] *Ibid.*, § 76.
[6] *Ibid.*, § 118.

committee is necessary only when the interest involved exceeds a certain value (300 marks). Among these are the commencement of actions, compromises, submissions to arbitration, allowances of claims for special privileges, redemption of articles held in pledge, and the sale of choses in action.[1] Finally, it decides upon the amount of dividends and the dates on which the distributions are to be made.[2] We see, therefore, that this committee plays a more important rôle than the *juge-commissaire* of the French law.

In England, a committee of inspection, consisting of creditors or their proxies, is appointed by the general assembly. It is charged with controlling the administration of the trustee, who must obtain from it authorization for his most important acts. It is composed of from three to five members, meets at least once a month, and may be convened at any time by the trustee or one of its own members. A majority of the members constitutes a quorum, and the votes of a majority of those present are required to give validity to its acts. If a member of the committee becomes bankrupt or compounds with his creditors, or is absent for five consecutive meetings, his office becomes vacant. A member may be removed and vacancies filled by the creditors in their general assembly. As we have already seen, if the creditors neglect or refuse to elect this committee, its duties are performed by the Board of Trade.[3]

The law of March 25th, 1872, in Denmark, and the law of June 3rd, 1874, in Norway, rest upon the principle that after the temporary measures have been taken and the general assembly convened, the creditors either personally or through their delegates shall exercise control. The committee consists in Denmark of three, and in Norway of two or three creditors, and its consent is necessary for the more important of the administrator's acts. In Norway when this authorization is to

[1] *Ibid.*, §§ 121, 122.

[2] *Ibid.*, § 138.

[3] *Statutes 46 and 47 Victoria*, c. 52, § 22.

be given the administrator and the committee meet together, the former having the deciding vote in case of a tie.[1] The members of the committee receive no fees, and may be removed by the general assembly of the creditors. In Denmark the administrator (curator) does not participate in the meetings of the committee.[2] In case of disagreement between him and the committee the *skifteret* decides, unless it prefers to call a meeting of the creditors, or unless such a meeting is demanded by the curator and the committee. When the administration of the estate has been assigned to several curators[3] the assembly may dispense with a committee, and its duties will devolve upon the *skifteret*.[4] In Denmark the duty of the committee is to exercise a general supervision over the curator. For this purpose it may examine the cash book every month, attend to the investment of the sums in the curator's hands, demand from him necessary information, *etc.*[5] The Norwegian law merely says that the administration is conducted under the control of the *skifteret* and the committee.[6] In Hungary the committee is composed of at least three members, to whom assistants may be given, and who are by preference selected from the creditors dwelling in the neighborhood. They act gratuitously, being allowed only their necessary disbursements. The judgment of bankruptcy appoints a day when the general assembly shall meet and make the election in the presence of the commissioner. The majority at this meeting is calculated according to the amount of the claims represented. While awaiting the action of this meeting the court has power, either *proprio motu* or at the request of the creditors, to join to the syndic a provi-

[1] *Bulletin de la Société de Législation Comparée*, 1885, p. 75; loi norvégienne, Art. 22 ff.

[2] *Ibid.*, p. 75; loi danoise, Art. 74.

[3] *Ibid.*, p. 75; loi danoise, Art. 67.

[4] *Ibid.*, p. 75; loi danoise, Art. 68.

[5] *Ibid.*, p. 75; loi danoise, Art. 77.

[6] *Ibid.*, p. 75; loi norvégienne, Art. 25.

sional committee composed of resident creditors, or of other persons competent to fulfill such duties.[1]

In Austria, the provisions in regard to the committee are quite similar to those contained in the Hungarian law.[2]

The Italian law of 1865, which copied the French Code, was completely revised, and a new Commercial Code promulgated in 1882. The surveillance over the curators is now exercised by a delegation of creditors composed of from three to five members. It chooses its own president, who thenceforth convokes and represents it. It may initiate certain measures in the interests of the creditors, for example, the removal of the curator.[3]

§ 2. *Appointment of the Syndics.* Three different methods have been employed for appointing the agents known as syndics, curators, administrators, trustees, *etc.*, upon whom devolves the duty of administering the estate. (1) They may be appointed directly by the court, as in France, Italy, Germany, Austria and Hungary. (2) They may be appointed by the creditors, acting either directly in general assembly or through their committee, as in Spain, England, Norway and Denmark. (3) The government may appoint special sworn agents from whom the syndics are to be chosen, as in Belgium.

In France, the declarative judgment which dispossesses the debtor appoints one or more provisional syndics. The creditors are consulted at their first meeting as to the choice of final syndics. According to a peculiar French principle which is found in other branches of the law, their advice is not binding upon the court, which forthwith appoints new syndics or retains those already chosen. They are, therefore, not truly representatives of the creditors, but judicial mandataries.

[1] Law of March 27th, 1881, Art. 106, 111.

[2] *Concursordnung*, §§ 74, 84, 140, 144, 146, 189.

[3] *Codice di Commercio*, Art. 723–726.

They need not even be taken from among the creditors; and in fact when only one is appointed, he is generally a person enjoying the confidence of the court, who has made the settlement of bankrupt estates his special profession. This method has all the inconveniences occasioned by the necessity of consulting the creditors, and yet does not secure to them any effectual participation in the choice of those to whom their interests are entrusted. No relative of the bankrupt up to and including the fourth degree may hold the office of syndic. The judge-commissary either at the request of the bankrupt or of the creditors, or of his own motion, may propose to the court the dismissal of a syndic. If petitions addressed to the judge-commissary are disregarded, they may be addressed directly to the court, which will render a decision, upon the question of removal, after hearing the report of the judge-commissary and the explanations of the syndic.[1]

In Italy, the law of 1865, (art. 546) resembled the French. The curators, whose number could not exceed three, were appointed by the court, and might or might not be taken from the body of creditors. Appointed at first provisionally, they were ultimately confirmed or replaced by the court after consulting the creditors. But this method has undergone some material changes in the new code, and the creditors are now given a voice in the selection of curators. The Chamber of Commerce with the advice of the Municipal Council prepares triennially a list of persons qualified to fill the office of curator. The court must appoint from this list unless, for reasons expressly given in the judgment, it considers it necessary to designate some other person. The creditors, however, at a later stage of the procedure, may substitute for this curator one of their own selection, even though he be not in the above mentioned list.[2] Both of these methods have been criticised by M.

[1] *Code de Commerce*, Art. 462, 463, 467.

[2] *Codice di Commercio*, Art. 714 ff.

Victorio Lanza.[1] He recommends the institution of licensed public liquidators, of whom bonds would be required. The management of the funds and the custody of the bankrupt's property would be given to these officials, while the curators would bring the judicial actions for the recovery of claims. The advantage of this system, in his opinion, is that it would deprive the curators of the actual possession of the property, and thereby remove from them the temptation to delay in the prosecution of the debtor's rights and the liquidation of the assets. He urges also that by conferring this office upon a public agency, greater efficiency would be secured, and the division of the procedure into successive stages, temporary and final, would be avoided.

In Germany, the court appoints the administrator.[2] In their first meeting the creditors elect another, but the court has the right to refuse its approval.[3]

By the Austrian law the court appoints a provisional administrator,[4] who is subsequently retained in office or replaced by another, upon motion of the creditors. Provision is also made for choosing an assistant administrator to act as a substitute in case of the disability of the regular appointee.[5] After the period of liquidation, however, the creditors may elect an administrator of their own choice,[6] and no mention is made in the law of any right on the part of the court to refuse its consent. It is worthy of note that the Austrian law expressly states that relationship with the bankrupt by blood or marriage is no disqualification for this office.[7]

By the Hungarian law the court appoints the syndic and,

[1] Les Réformes en Matière de Faillite, *Traité de Droit Commercial et Pénal.*

[2] *Konkursordnung*, §§ 70, 102.

[3] *Ibid.*, § 72.

[4] *Concursordnung*, §§ 73, 74.

[5] *Ibid.*, §§ 74, 81.

[6] *Ibid.*, § 143.

[7] *Ibid.*, § 143 (3).

in case he is a creditor, an assistant syndic also, whose principal duty is to verify the claims produced by the syndic. Both are taken from among the lawyers resident within the jurisdiction of the court.[1]

The Spanish law says that the syndics, who are not to exceed three in number, shall be chosen by the creditors from the honorable traders of the place of the bankruptcy.[2]

In England, the "trustee," who succeeds the "official receiver," is appointed by the creditors in their general meeting. They may, however, decide to leave the appointment to the committee of inspection. The trustee must give such a bond as will be satisfactory to the Board of Trade. This matter was left by the law of 1869 to the general assembly of creditors, but in practice their power in this respect was seldom exercised. The Board of Trade may object to the appointment on the ground that it was not made in good faith by a majority in value of the creditors voting, or that the person chosen is incompetent, or that his relations with the debtor or his estate or any creditor are such as to make it difficult for him to act impartially. If a majority in value of the creditors so request, the Board must notify the High Court of the objection, and the court will then decide upon its validity. If the creditors neglect within a certain time to make an appointment, the official receiver certifies this fact to the Board of Trade, and they will then choose a trustee. The creditors may, however, at any time, select another person, who will take the place of the trustee appointed by the Board.

In Norway the provisional administrator is appointed by the *skifteret* with the advice of the creditors present (Art. 14). In Denmark, the *skifteret*, in the presence of and after consultation with the creditors, chooses the provisional administrator; but when the appointmest cannot be deferred, the *skifteret* may

[1] Law of March 27th, 1881, Art. 3, 94, 100–102.

[2] *Código de Comercio de 1829*, Art. 1068, 1069. 1070; *Ley de Enjuiciamiento Civil*, Art. 1346.

proceed at once without awaiting the meeting of the creditors (Art. 53). The provisional administrator may be a creditor, but may not be the relative of the debtor, by blood or marriage to the degree of cousin-german, or be either in the service of the court, or one of its members.

The final administrator or curator, in both Norway and Denmark, is chosen in the assembly of creditors by the vote of a majority in number.[1] In Denmark, the *skifteret* may reject the choice made by the creditors, and a new appointment is then made, which the court must approve, unless there be special objections against the person himself. If no one receives a majority of the votes, or if, in Denmark, the creditors present do not represent a third of the claims, the *skifteret* names the curator; but in Norway his choice is restricted to those persons for whom votes have been cast (Art. 21, 79). The curator may be removed by the court either of its own accord or on application of the committee of creditors.[2]

Finally, in Belgium, sworn liquidators (*liquidateurs assermentés*) are appointed by the government, and from these the courts choose the curators in bankruptcy.[3]

§ 3. *The Powers and Duties of the Syndics.* The administration of a bankrupt's estate includes a series of operations such as precautionary measures, proof of the liabilities, and liquidation of the assets. Some of these acts are to be done in the interest of both the creditors and bankrupt, some in the particular interest of the bankrupt, and others in the public interest by way of criminal prosecution. In some countries the most important of these duties devolve upon the syndics, while in others, as Germany, much wider powers are conferred upon the creditors. We shall consider first the duties of the syndics.

[1] Norway, Art. 21; Denmark, Art. 66.

[2] Norway, Art. 26, 81; Denmark, Art. 71; *Bulletin de la Société de Législation Comparée*, 1885, p. 75, 76.

[3] *Loi du 18 avril, 1851*, Art. 455, 456.

(1) *The Precautionary Measures in regard to the Property*, are intended to prevent any removal of it by the bankrupt after the judicial declaration. The most important of these measures are the affixing of seals and the preparation of an inventory. The declarative judgment orders the affixing of seals at the residenee and place of business of the bankrupt. This is provided for in the laws of France,[1] Belgium,[2] Italy,[3] Spain,[4] Austria,[5] Germany,[6] Norway and Denmark.[7] This operation, in France, consists in the placing of pieces of tape on the doors, windows, warehouses, counters, cash boxes, furniture, *etc.*, of the bankrupt, in order to prevent their being opened. The pieces of tape are fastened together at the ends and sealed with wax, and the violation of these seals is an offense punishable with imprisonment. The syndics in France may be authorized by the judge-commissary to dispense with placing seals upon the wearing apparel, furniture, and other effects necessary to the bankrupt and his family, and of which the delivery to him has been authorized by the judge-commissary on the statement submitted to him for the purpose by the syndics; such articles as are perishable or liable to depreciation; and such as are necessary for carrying on the business if it cannot be interrupted without damage to the creditors.[8] In England, there is no necessity for sealing, because the trustee in that country is invested with the legal title itself of the debtor's property, and is not simply an administrator, like the syndics upon the Continent.

[1] *Code de Commerce*, Art. 455, 456, 479.

[2] *Loi du 18 avril, 1851*, Art. 468–470.

[3] *Codice di Commercio*, Art. 733, 740.

[4] *Código de Comercio de 1829*, Art. 1044, 1046; *Ley de Enjuiciamiento Civil*, Art. 1334.

[5] *Concursordnung*, §§ 86–95.

[6] *Konkursordnung*, §§ 112, 114.

[7] *Bulletin de la Société de Législation Comparée*, 1885, p. 73; loi norvégienne, Art. 13; loi danoise, Art. 51.

[8] *Code de Commerce*, Art. 469.

The inventory is a document containing an enumeration of all the objects found on the bankrupt's premises, and gives a full description and the approximate value of all the personal property so found. The description is intended to prevent the removal of the property, and the estimate of value to render it impossible to substitute for articles of a greater, those of a lesser value. At the preparation of this inventory, the bankrupt has in general a right to be present, since he has an interest in having it drawn up in a proper manner. Among other precautionary measures prescribed by the French law may be mentioned the registration of mortgages upon the real property of the bankrupt's debtors.[1] The syndics must also in the interest of the estate procure the registration of the legal mortgage of the general body of creditors over all the real property of the debtor of which they have knowledge.[2] This legal mortgage is sometimes of value notwithstanding the fact that the sales and mortgages of the debtor after the adjudication are voidable; for example, when by an order of discharge under a composition, the bankrupt regains his freedom of action in dealing with his property, this creditor's mortgage still survives until all the conditions of the composition have been performed. Although conveyances and mortgages made by the debtor after this discharge are valid, yet the creditors' mortgage takes priority, if it has been duly registered by the syndics, and they may follow the property into the hands of subsequent purchasers. The syndics must also acquire possession of all negotiable instruments that are due in order to effect a recovery, as well as those becoming due or requiring acceptance, in order that they may be presented for payment or acceptance.[3] They must also carry on the bankrupt's business, if authorized by the judge-com-

[1] *Code de Commerce*, Art. 471.

[2] By French law every judgment gives the creditor a judicial mortgage upon the real property of his debtor.

[3] *Ibid.*, Art. 490.

missary[1] and with his consent may sell such articles as are perishable, liable to depreciate in value, or expensive to preserve.[2] Finally, they may examine the debtor's books and papers, and on account of the number of interests involved, may even violate the secrecy attaching to letters and open the bankrupt's correspondence.[3]

(2) *Proof of the Liabilities.* As soon as bankruptcy is opened, the creditors are notified that they must produce their claims against the bankrupt. A creditor will not be entitled to a share in the dividends unless his claim be proved and admitted. It is therefore a rule in all countries that a creditor who wishes to receive his proportion of the assets must present his vouchers, attest the truth of his claim, and obtain its verification. All the creditors, except those specially secured by mortgages or otherwise, must comply with this formality of proving claims. With this end in view, the laws of each country provide for the publication of the declarative judgments, and for other incidental measures, which do not differ very greatly in the various systems. The limits of time within which the claims must be produced are also determined, and the allowances made for creditors dwelling at a distance or in foreign countries. These provisions may be found in detail in the different laws and codes.[4] The proofs required for the admission of a claim depend upon the procedure of each country.

(3) *Proof and Liquidation of the Assets.* For the proof of the

[1] *Ibid.*, Art. 469, § 3.

[2] *Ibid.*, Art. 470.

[3] *Ibid.*, Art. 471.

[4] France, *Code de Commerce*, Art. 491–494; Belgium, *Loi du 18 avril, 1851*, Art. 496 ff; Italy, *Codice di Commercio*, Art. 758 ff; Spain, *Código de Comercio de* 1829, Art. 1101 ff, and *Ley de Enjuiciamiento Civil*, Art. 1378 ff; England, *Statutes 46 and 47 Victoria*, c. 52, Second Schedule, § 39; Austria, *Concursordnung*, §§ 103–106; Germany, *Konkursordnung*, §§ 68, 102, 126 ff; Norway and Denmark, *Bulletin de la Société de Législation Comparée*, 1885, p. 81; loi norvégienne, Art. 50; loi danoise, Art. 84.

assets most laws require that the debtor, upon confessing the fact of his cessation of payment,[1] or upon offering a petition for a declaration of bankruptcy,[2] must at the same time deposit his balance—sheet. In England, when a "receiving order" is made against a debtor, he must submit to the "official receiver" a statement of his affairs, showing the condition of his assets and liabilities, and the names of his creditors.[3] Another important means adopted for this purpose is the preparation of an inventory of the estate.[4] In England, a debtor must present an inventory of his property as soon as a "receiving order" is made against him.[5] The liquidation of the assets has been entrusted to the syndics, curators, trustees, *etc.*, who have been given for this purpose wide powers of bringing actions, compromising, *etc.* It is believed that it may often be for the interest of the bankrupt to terminate legal proceedings by a compromise, and thus avoid expense and loss of time. In France[6] the syndic with the authorization of the judge-commissary, and after notice to the bankrupt, may compromise disputed claims, subject, however, to the confirmation of the court, if the amount in controversy exceeds a certain sum (300 francs). If the compromise relate to personalty, it is the

[1] France, *Code de Commerce*, Art. 439; Belgium, *Loi du 18 avril*, 1851, Art. 441; Italy, *Codice di Commercio*, Art. 686; Spain, *Código de Comercio de* 1829, Art. 1017, 1018; *Ley de Enjuiciamiento Civil*, Art. 1324; Austria, *Concursordnung*, §§ 194, 195.

[2] Germany, *Konkursordnung*, § 96; Norway and Denmark, *Bulletin de la Société de Législation Comparée*, 1885, p. 64, 65; loi norvégienne, Art. 7; loi danoise, Art. 47.

[3] *Statutes 46 and 47 Victoria*, c. 52, § 16 (1).

[4] France, *Code de Commerce*, Art. 479; Belgium, *Loi du 18 avril, 1851*, Art. 488; Italy, *Codice di Commercio*, Art. 740; Spain, *Código de Comercio de* 1829, Art. 1079 ff, and *Ley de Enjuiciamiento Civil*, Art. 1355; Germany, *Konkursordnung*, § 114; Austria, *Concursordnung*, § 91.

[5] *Statutes 46 and 47 Victoria*, c. 52, § 24.

[6] *Code de Commerce*, Art. 487.

Tribunal of Commerce, if to realty, the Civil Tribunal, that must give its approval.

The bankrupt must be summoned to such confirmation, and in every case has the right to oppose. His opposition suffices to prevent the compromise if the same relate to real property. The Code of Commerce, which regulated bankruptcy previous to the Law of 1838, did not confer upon the syndics this important right of compromise. Its authors thought that the advantages to be gained from facilitating recoveries by the prevention or termination of law-suits would not compensate for the evils resulting from this power in the syndics to favor certain persons at the expense of the estate, and in other ways to subject it to serious losses. In Italy the judge-delegate (*giudice delegato*), with the assent of the committee of the creditors, may authorize the curator to compromise disputed matters affecting the creditors. When the amount in controversy is uncertain, or exceeds 1500 lire, the compromise must be confirmed by the court.[1] In Belgium if the action relate to real property, or if the amount in dispute is uncertain, or exceeds 300 francs, the compromise will be valid only after confirmation by the court upon report of the judge-commissary.[2] In Germany the approval of the committee of the creditors, and in England the permission of the committee of inspection, is necessary.[3] In Austria, the authorization of the judge-commissary is requisite for compromises made anterior to the verification of claims, and that of the committee of the creditors for those made subsequently.[4]

In Norway and Denmark, if by the compromise a concession greater than 200 *kroner* in Denmark (art. 75, 2°) or 100 *kroner* in Norway (art 27, 2°) is to be made, the adminis-

[1] *Codice di Commercio*, Art. 797.

[2] *Loi du 18 avril*, 1851, Art. 492.

[3] *Konkursordnung*, § 121 (2); *Statutes 46 and 47 Victoria*, c. 52, § 57 (6), (7), (8).

[4] *Concursordnung*, § 140, 147.

trator must obtain the consent of the committee of the creditors, or, in case of their refusal, the consent of the *skifteret*.[1] The right to compromise is granted in all the countries, and the variations are simply in regard to the amount in dispute and the mode of confirmation.

To render impossible, or at least difficult, any misappropriation of the moneys collected by the syndics, in many countries they are required to deposit the sums received in a public treasury. The French law provides that after a deduction has been made of such sums as the judge-commissary may consider necessary for the current expenses of the bankruptcy, the residue shall be paid at once into the *Caisse de Depôts et Consignations*,[2] where the moneys produce interest at the rate of three per cent., commencing sixty days after the date of the deposit. In case the syndics neglect to make this deposit, they are compelled to pay interest at the legal rate (five per cent.) upon the sums received. As a further safeguard, the money paid into the *Caisse* can be drawn out only by an order of the judge-commissary.[3] But in practice, it is said, this duty is generally disregarded, and it is no uncommon occurrence for a syndic to keep large sums of money on deposit with his own banker. The additional requirement that the syndic shall render every three months to the judge-commissary a statement of the sums deposited, so that the latter may order a distribution among the creditors (art. 566), is also frequently neglected.

Analogous provisions are found in Belgium,[4] Italy,[5] Spain,[6]

[1] *Bulletin de la Société de Législation Comparée*, 1885, p. 76.

[2] This is an institution established by the French government for the purpose of receiving money which has been paid into court.

[3] *Code de Commerce*, Art. 489.

[4] *Loi du 18 avril*, 1851, Art. 479.

[5] *Codice di Commercio*, Art. 753.

[6] *Código de Comercio de* 1829, Art. 1094, and *Ley de Enjuiciamiento Civil*, Art. 1361.

and the Netherlands.[1] The English legislature has guarded against the abuses that may arise from allowing money to accumulate in the hands of the trustees by requiring it to be deposited in the Bank of England; but in certain exceptional cases, if the committee of inspection deem it for the advantage of the creditors that the trustee shall have an account with a local bank, the Board of Trade on the application of the committee will authorize the trustee to make his deposits in such local bank as the committee may select. All payments and receipts are then made through this bank. If the trustee retains for more than ten days a sum exceeding £50, or such sum as the Board of Trade has permitted him to keep, he is obliged to pay twenty per cent. interest unless he can furnish an excuse that meets the approval of the Board of Trade, and if this proves ineffectual, he may be removed from his office.[2]

(4) *The Responsibility of the Syndics.* In all countries the syndics are held responsible for misconduct and negligence. By the Danish law the curator can be compelled on the application of the committee of the creditors, to furnish a bond.[3] Their responsibility is that of ordinary attorneys.[4] In Italy, the court may require the curator to give a bond either by the declarative judgment of bankruptcy or subsequently, and either of its own accord, or at the request of the committee of the creditors.[5] According to the German law, the court may compel the administrator to give a security.[6] He is bound to exercise the care of an orderly father of a family (*ein ordentlicher Hausvater*[7]), that is to say, he is responsible for *culpa levis;*

[1] *Wetboek van Koophandel*, § 810.

[2] *Statutes 46 and 47 Victoria*, c. 52, § 74.

[3] *Bulletin de la Société de Législation Comparée*, 1885, p. 77; loi danoise, Art. 70.

[4] *Ibid.*, p. 76; loi danoise, Art. 76, 1°; loi norvégienne, Art. 25.

[5] *Codice di Commercio*, Art. 721.

[6] *Konkursordnung*, § 70; *Civilprocessordnung*, § 101.

[7] *Konkursordnung*, § 74.

and he is placed under the control of the court, in the sense that it has the right to examine whether his acts or omissions are in violation of his duty. The judiciousness of his conduct is not subject to the control of the court.[1] For violations of duty the court may impose fines to the amount of two hundred marks. It may, also, before the first meeting of the creditors following his appointment, remove him from office *proprio motu;* subsequently only on motion of the general assembly or the committee of the creditors.[2] In France, where the freedom of the syndics is greatest, and the complaints of their misconduct loudest, no bond is required. As they are often men without property, there is no way of holding them to the responsibility nominally imposed upon them by law.

§ 4. *The Different Kinds of Creditors.* In estimating the value of the estate, articles in the bankrupt's possession which are the property of others must not be included. The owners of such articles may in every country claim restitution by means of an action at law. This is known as reclamation, or, in French law, *revendication.* But the exercise of this right may be subjected to certain conditions imposed in the interests of the creditors. Among the cases where a claim for reclamation may be made, we may mention the case of commercial paper delivered by the owner without any intention to transfer his property therein, but merely for the purpose of obtaining payment and having the amount so collected held at his disposal or applied to the discharge of certain specified debts.[3] Restitution may likewise be demanded of goods simply deposited with the bankrupt or consigned to him for sale, so long as they are in existence; for claims for restitution may only be enforced for actually existing objects. The Spanish law in applying to this class of persons the term of "creditors" (*accree-*

[1] *Ibid.*, § 75 and note.

[2] *Ibid*, § 76.

[3] *Code de Commerce des Français*, Art. 574.

dores de dominio) seems to confound rights of property with rights of action or debts.

Considering then only persons who are properly creditors, they may be classified as follows:

1. Secured creditors; that is, those who have received from the debtor some special security for their debts.

2. Privileged creditors; that is, those who from motives of public policy have received from the law a preference giving the right of priority in payment.

3. The bankrupt's wife.

4. All other creditors, who come in for their proportionate share of the assets remaining after payment of the preferred creditors.

(1) The principles governing the rights of secured creditors are the same in all systems of legislation upon bankruptcy. Mortgagees may exercise their rights upon the property mortgaged, and pledgees upon the object pledged. The property is sold, the secured claim is paid from the proceeds, and the surplus, if any, falls back into the general mass. If the amount realized is insufficient to satisfy the creditor's claim in full, he may prove the remainder against the estate as an ordinary creditor.

(2) The statutes of the various countries enumerate the claims which entitle their holders to be ranked in the second class, namely, of creditors privileged by law. In France these privileges are found in the Civil Code (art. 2101, ff.) Besides. claims of the State for taxes, imposts, *etc.*, the Code mentions general privileges over movables, and special privileges over certain movables. The claims that have a general privilege are: 1. Legal expenses; 2. Funeral expenses; 3. The various expenses of the last illness; 4. The wages of domestic servants for the portion of the current year already expired, and for the year immediately preceding; 5. Provisions and articles of household use supplied to the debtor and his family during the last six months, as regards retail tradesmen, such as

bakers, butchers, and similar persons, and during the last year, as regards masters of boarding-schools and wholesale traders. Since these privileges apply equally against the estates of deceased persons and bankrupts, the periods of time mentioned are those preceding the death of the person deceased or the dispossession (*dessaisissement*) of the bankrupt. Claims having this privilege are to be paid from the proceeds of the sale of movables not specially appropriated to any debt. The claims that have a special privilege as regards certain movables, and are to be paid from the proceeds of the sale of such movables, are: 1. The rent of real property, as regards the produce of the crop of the current year, and as regards all the furniture in the house or farm rented, and everything relating to the use and working thereof.[1] This privilege is given to the rent due, and that not yet due. The creditors may re-let the house or farm for the remainder of the term, and make any profit possible, but they are required to pay the landlord what is still due him. The same privilege is extended to claims for repairs incumbent upon the tenant. 2. The claim of a bailee, as regards the proceeds of the sale of the property that formed the subject of the bailment. 3. The claim of a creditor who has preserved or improved certain property, as regards the value of the property so preserved or improved. 4. The claim of an innkeeper, as regards the effects brought by a traveller to his inn. 5. The claim of a carrier, as regards the articles transported.

The Code of Commerce has modified the Civil Code by suppressing the privilege of the unpaid vendor of personal property. This was done to prevent unpaid vendors from delivering goods into the possession of a debtor and thus enabling him to maintain a false appearance of solvency. The Commercial Code has also added a new privilege in favor of clerks and work-people. Article 549 declares that the wages

[1] This is the Roman lien of the landlord on "*introducta, importata et ibi nata*," *etc.*

of workmen employed directly by the bankrupt, due for the month previous to the declaration of bankruptcy, and the salaries of clerks for the six months preceding the declaration, shall rank as privileged claims in the order prescribed by article 2101 of the Civil Code for the salaries of household servants. Another modification has been introduced as regards the landlord of real property used by the bankrupt for his trade or business. In case the lease is cancelled, (the syndic having the option to cancel or maintain a lease,) the landlord becomes a privileged creditor for the amount of the rent due for two years prior to the judicial declaration of bankruptcy, as well as for the current year, and for all expenses relating to the carrying out of the lease, and for any damages that may be awarded by the court, arising from the cancellation of the lease. If the lease is not cancelled, after the landlord has been paid the rent already due, he is not entitled to receive rent to become due in the future, so long as the securities that have been furnished are considered sufficient. But if personal property is sold or removed from the premises, the landlord may enforce his privilege for the rent of the current year and the year following.[1]

In Belgium, a privilege is also given to the suppliers of machines and apparatus employed in industrial establishments. This privilege continues for two years from the date of the delivery of the articles, and to secure it the creditor must comply with certain formalities of registration. This gives notice to the world that the price of these articles has not been paid, and thus removes the objection that may be raised against a privilege in favor of an unpaid vendor of personal property delivered to the vendee.[2]

In England a preference is given to taxes, and the wages or salaries of workmen, servants, or clerks, not exceeding £50, for services rendered during the four months before the date

[1] *Loi du 21 février*, 1872.

[2] *Loi du 16 décembre*, 1851, Art. 20.

of "the receiving order".[1] An apprentice is given a privileged claim for a breach of his contract,[2] and a landlord for the previous year's rent. A landlord may distrain at any time upon the goods of the debtor for rent due him, but if the distress be made after the commencement of bankruptcy, it is available only for one year's rent accrued due prior to the order declaring the bankruptcy.[3]

The German law, after treating of *Aussonderung*,[4] under which head are included claims for restitution to their owners of goods that are not the property of the bankrupt although in his possession, passes to *Absonderung*[5] under which are embraced the claims of the secured and privileged creditors to special payment. The privileged creditors are in general like those of the French Code, with some modifications in detail. Among them are the government treasury, which has a privilege over the movables of the debtor for taxes; landlords, who have a privilege over the crops, or personal property brought on the premises, for the rent of house or farm already due and becoming due; innkeepers, over the goods brought by guests to their inns, for the amount of their bills; artisans and workmen, over goods made or improved by them, for their claims for labor and expenditures. The privilege of the carrier is not mentioned in the *Konkursordnung* of 1877, but is recognized in the Code of Commerce (§ 409).

The Hungarian law, after treating of those who have rights of property and are entitled to reclamation, divides all other claimants into three classes: (1) creditors of the estate; (2) those who have a right to enforce payment of their claims outside of bankruptcy; (3) those who enter as competitors in

[1] *Statutes 46 and 47 Victoria*, c. 52, § 40 (1).

[2] *Ibid.*, § 41 (1).

[3] *Ibid.*, § 42 (1).

[4] *Konkursordnung*, §§ 35–38.

[5] *Ibid.*, § 39–45.

the bankruptcy proceedings. As regards the first class, the estate is indebted on obligations contracted by the syndic in his character as such, on obligations arising from contracts made with the bankrupt and the performance of which has been demanded for the benefit of the estate, and also for any profits it may have unjustly acquired (Art. 48). It is also a personal debtor for the general expenses of the bankruptcy proceedings, for taxes falling due in the course of the bankruptcy proceedings, for the expenses necessitated by the last illness and funeral of the debtor in case of his death after the opening of the proceedings, and for the allowance made to the debtor for his support (Art. 49). If the assets do not suffice to pay in full these debts and expenses of the estate, the debts take priority over the expenses. Under the second class come both secured and privileged creditors.

Those whose claims against the bankrupt have arisen from the relation of co-ownership or partnership, are entitled to a preferred payment out of the bankrupt's interest (Art. 51). Among the privileged claims are

a) Those of hotel-keepers on the goods belonging to the debtor in their possession.

b) Those of artists, manufacturers, contractors, and workmen for their salaries, and expenditures on articles they have manufactured or repaired and which are in their possession.

c) Those of the lessors for house or farm rent on articles assigned as their guarantee for payment.

d) Those of creditors who are given liens by the Code of Commerce.

e) Those of creditors who have made expenditures for the improvement of articles belonging to the estate, on the articles for which the expenditures have been made, so long as they are still in their hands.

f) Those of lawyers for the expenses of law-suits they have instituted in proportion to the profit accruing to the estate, in consequence of the suits (Art. 57).

The third class of creditors must prove their claims against the estate, and are paid out of what remains after the creditors of the preceding classes have been satisfied. They are themselves divided into three sub-classes. In the first are included those creditors to whom the law (Art. 60) gives a general privilege over the goods of the bankrupt, namely, servants for their wages for the preceding year, expenses of the funeral and the last illness of a debtor who has died before the opening of bankruptcy for a period not exceeding one year prior to the opening, taxes accrued due within the three preceding years, claims of minors, and of persons under guardianship arising out of the administration of the father, tutor or curator. These creditors take precedence over the two following classes and rank among themselves in the above order (Art. 61). The second sub-class embraces all other claims. Interest and annuities accrued due within three years prior to the opening of bankruptcy are admitted to the same class as the principal of the claim from which they arise (Art. 62). Interest and annuities not so classified form the third sub-class.[1]

The Danish law prescribes in detail the order in which claimants must be paid. It divides the claims into two categories.

1) Those which are to be paid from the mass, or estate of the bankrupt.

2) Those which are to be paid from the proceeds of particular objects.

It will be observed that the first category includes both the ordinary creditors and those having general privileges against the estate, while the second includes both secured creditors and those having special privileges. The first category comprises the legal expenses of the procedure, funeral expenses, taxes, certain privileged claims, such as for personal taxes, house rent for one year before the bankruptcy, wages of ser-

[1] Law of March 27th, 1881; *Annuaire de Législation Étrangère*, 1882, p. 327, 328.

vants, fees of druggists, physicians, mid-wives, and nurses for services rendered during the preceding year, claims secured by law or by agreement between the parties by a special pledge upon movables, and, finally, all other personal claims, with the exception of executory gifts. For the claims embraced within the second category, the bankrupt law merely refers to the provisions of the civil law.

In Norway the law is silent on the question of priorities, but regulations similar to those in Denmark are to be found in the Code of Christian V. (5, 13.)[1]

3) The policy of the laws as regards the bankrupt's wife has been to limit her rights to a large extent, in order to prevent her husband, when on the verge of insolvency, from settling the greater part of his estate upon her, and thus prejudicing the interests of his creditors. According to the French Code,[2] with which the Belgian law[3] and the Italian Code[4] agree in substance, when the marriage has not merged the wife's property in that of her husband (*mariage en communauté*) the wife is entitled to all the real estate belonging to her at the time of the marriage, and such as has subsequently devolved upon her by inheritance, gift or devise (Art. 557). In this case there is no danger that the claims may be fraudulent, since she takes only property of which she has never ceased to be owner, nor that the property has been bought with money belonging to the bankrupt's estate. The law does not take the precaution therefore to require any special mode of proof. She may also resume the exclusive right to any real property acquired by her in her own name, with money received from inheritances or gifts. But to prevent fraud, it is provided that the source whence her money was derived must be proved by

[1] *Bulletin de la Société de Législation Comparée*, 1885, pp. 83, 84; loi danoise, Art. 31–39.

[2] *Code de Commerce*, Art. 557–564.

[3] *Loi du 18 avril*, 1851, Art. 553–560.

[4] *Codice di Commercio*, Art. 780–787.

an inventory (*inventaire*) or other notarial document (*acte authentique*), and that the clause of *emploi* stating the investment of the money therein be expressly contained in the purchase deeds (Art. 558). Aside from this case and the provisions of the marriage contract, the legal presumption will be that any property acquired by the wife during the marriage has been purchased with her husband's money, and should be included in the assets. The *onus probandi* will rest upon the wife to prove the contrary. This is the provision of the German law,[1] as well as of the French, Belgian and Italian laws.[2]

Any real property of the wife will, of course, be subject to mortgages imposed upon it either by her voluntary consent, or by judgment of the court: but if it has been mortgaged for her husband's debts, she may prove the amount against the estate.[3] If the wife has paid debts for her husband, the legal presumption will be that it was done with her husband's money, and, unless the contrary be proved, she can not recover against the estate (Art. 562). The wife may also resume possession of the personalty that may come to her under her marriage contract, or that may have devolved upon her by succession, gift *inter vivos* or bequest, and that has remained in her separate estate, provided the identity of the property is proved by an inventory or other notarial document. (In Italy a document having a certain date is sufficient.[4]) In the absence of such proof, this personalty will be included in the estate divisible among the creditors, with the exception of whatever wearing apparel and linen the syndic, by permission of the judge-commissary, may have permitted the bankrupt to retain (Art. 560).

[1] *Konkursordnung*, § 37.

[2] Under the rule of the Roman law which prohibited gifts between husband and wife, the same presumption was recognized: that whatever could not be shown to have come into the wife's hands from another source, was to be regarded as having come to her from her husband.—*Digest*, 24, 1, 51.

[3] *Code de Commerce des Français*, Art. 561.

[4] *Codice di Commercio*, Art. 783.

In bankruptcy the general principles of law in regard to the *hypothèque légale* of a married woman[1] have been somewhat modified by the Code of Commerce. Ordinarily the wife's *hypothèque légale* affects all the real property of her husband, including that acquired after the marriage. In the case of bankruptcy, however, if the debtor was a trader at the time of his marriage, or having no occupation at that time, becomes a trader within a year thereafter, the wife's *hypothèque* does not attach to the realty of her husband purchased since the marriage (Art. 563). The reason of this is clear. It is supposed that in many cases this property has been purchased with the money of his creditors. Again, by the rules of the civil law the *hypothèque légale* is security for all the claims of the wife against the husband, even including those arising from gifts bestowed upon her by her husband; but, to prevent fraud, the Code declares that the wife of a trader who has become bankrupt can have no claim against the estate in respect of any benefits contained in the marriage contract (Art. 564).

The Belgian and Italian laws have introduced some modifications. In Belgium the marriage contract names the immovables then belonging to the husband that are to be affected by the *hypothèque* given the wife as security for her dowry, and an order of the president of the court does the same for rights that come to her during the marriage.[2] In Italy, by the Civil Code, if no other arrangement was made by the parties themselves, only the immovables belonging to the husband at the time of the marriage will be subject to the legal lien securing the dowry, but to secure property which has come to the wife by gift or inheritance during the marriage the lien will affect all the immovables belonging to the husband at the date of such gift or inheritance.[3]

[1] This is a mortgage which a married woman has by operation of law upon the immovables of her husband as security for any claim she may have against him.

[2] *Loi du 16 décembre*, 1851, Art. 47 ff.

[3] *Codice Civile*, Art. 1969 (4).

By the Spanish law, the wife may reclaim as *acreedor de dominio* her dowry, which must be proved by public record, and also all paraphernalia (*los bienes parafernales*) that is, separate property, not included in the *dos*, which has come to her by succession, gift or legacy.[1] The wife's lien (*hipoteca legal*) in Spain is only the right to demand a special lien upon certain immovables of her husband, sufficient in value to give her adequate security for her claims. The immovables that are to be affected must be determined by the parties themselves, or if they have not done so, by the judge.[2]

The German law allows the wife to recover property that she has acquired during coverture only so far as she establishes that the acquisition has not been made with money belonging to her husband.[3]

In Hungary, she is limited to reclaiming property that belonged to her before coverture, or has been acquired by her subsequently. In the latter case, she must offer satisfactory proof that it was not purchased with her husband's money.[4]

According to the Austrian law, the declaration, oral or written, made by the husband before the opening of the bankruptcy, that he has received dotal property, in order that it may be proved against the estate must have been made either at the time he received the dowry or at the latest one year before the opening of bankruptcy, and the date of this declaration must be proved by evidence other than the date inscribed upon the deed.[5]

From the payment which she has received in accordance with the marriage contract, the wife must reimburse to those persons who became commercial creditors of her husband prior

[1] *Código de Comercio*, Art. 909, 1°, 2°; *Código Antiguo*, Art. LI14, 1°, 2°.

[2] *Ley Hipotecaria*, Art. 158, 160, 162.

[3] *Konkursordnung*, § 37.

[4] Law of March 27th, 1881, Art. 46.

[5] *Bürgerliches Gesetzbuch*, § 1226; *Concursordnung*, § 49.

to the registration, the difference between the amount which they have received and that which they would have received, if there had been no marriage contract.'

In England, less attention has been devoted to the rights of the wife, because by the common law the husband acquired all his wife's property by marriage unless by an ante-nuptial settlement her property had been conveyed to a third party to hold in trust for her, in which case the trustee exercised her rights against the estate if her husband was declared bankrupt. Since the passage of the Married Woman's Property Act of 1882, however, a married woman may acquire, hold and dispose of property in the same manner as if she were a femesole, without the intervention of a trustee. This act also provides that "any money or other estate of the wife lent or entrusted by her to her husband for the purpose of any trade or business carried on by him, or otherwise, shall be treated as assets of her husband's estate in case of his bankruptcy, under reservation of his wife's claim to a dividend as a creditor for the amount or value of such money or other estate, after all claims of the other creditors of the husband for valuable consideration have been satisfied."[2] Any gift by a husband to his wife of property which continues to be in the disposition or reputed ownership of the husband, or any investment of moneys of the husband made by or in the name of the wife in fraud of his creditors, may be followed by the creditors, as if this act had not been passed.[3]

From the foregoing it appears that the purpose of the laws in every country is, in general, to secure to a married woman the enjoyment of her separate estate, and at the same time to prevent a man from withdrawing his own property from the reach of creditors by means of fraudulent conveyances to his wife.

[1] *Ibid.*, § 50.

[2] *Statutes 45 and 46 Victoria*, c. 75, § 3.

[3] *Ibid.*, § 10.

4) Finally, all creditors who are not secured, or privileged by law, are embraced within the fourth category of general or ordinary creditors. In all countries, after the preferred claims have been settled, the remaining assets must be distributed *pro rata* among the general creditors whose claims have been proved and allowed in the manner prescribed by law.

CHAPTER IV. THE CLOSING OF BANKRUPTCY.

§ 1. *Introductory.* A bankruptcy may terminate in one of several ways. If it has been permitted to pursue its normal course, it will end naturally by the final distribution among the creditors, when it is apparent that nothing more can be realized from the estate. The regular and orderly march of proceedings may, however, be arrested by an arrangement or composition entered into by the creditors with the debtor according to terms upon which they mutually agree. It may also be necessary to close a bankruptcy because it is apparent that the assets will not even suffice to defray the ordinary legal expenses of the procedure. And lastly there may be pre-existing or subsequently arising causes which will justify the court in annulling a bankruptcy.

It is proper to add that compositions are of two kinds, first, ordinary compositions which contain such stipulations and are based upon such conditions as the debtor and creditors may agree upon among themselves, and second, compositions by relinquishment of assets (called in French law *concordats par abandon*) by which the debtor obtains from his creditors a total or partial discharge, on condition of the surrender of all or part of his assets.

The ordinary composition after bankruptcy is found in France,[1] Belgium,[2] Italy,[3] Spain,[4] Germany,[5] Austria,[6] Hungary,[7] England,[8] Norway and Denmark.[9]

[1] *Code de Commerce*, Art. 504–526.

[2] *Loi du 18 avril 1851*, Art. 509–527.

[3] *Codice di Commercio*, Art. 830–845.

[4] *Código de Comercio*, Art. 898–907; *Código Antiguo*, Art. 1147–1167.

[5] *Konkursordnung*, §§ 160–187.

[6] *Concursordnung*, § 207 ff.

[7] Law of March 27th, 1881, Art. 200–236.

[8] *Statutes 46 and 47 Victoria*, c. 52, §§ 18 and 19.

[9] *Bulletin de la Société de Législation Comparée*, 1885, p. 84; loi danoise, Art. 100; loi norvégienne, Art. 60.

The composition by relinquishment of assets we find in France[1] and Greece.[2]

In every country bankruptcy will be closed, as a matter of course, when the assets have been finally distributed; but France,[3] Belgium[4] and Italy[5] provide for what the French law calls the "state of union" (*l'état d'union*) that is, closing by investing the creditors with the right to liquidate and distribute the assets.

Closing for insufficiency of assets is found in France,[6] Belgium,[7] Italy,[8] Germany,[9] Austria,[10] Hungary,[11] Norway and Denmark.[12]

§ 2. *The Ordinary Composition.*

I. In France.

(*1*) *Formation of the Composition.* In many cases it is for the interest of the creditors to release the debtor from a portion of their claims, rather than submit to the delays of an ordinary liquidation. Furthermore, justice may require that an honest debtor should be allowed to continue his business, and, if possible, retrieve his shattered fortunes. To secure these results, the laws of many countries provide for a composition called in French law *un concordat.* This is an arrangement between the bankrupt and a majority of his creditors by which

[1] *Code de Commerce*, Art. 541.

[2] *Annuaire de Législation Étrangère*, 1879, p. 673.

[3] *Code de Commerce*, Art. 529–540.

[4] *Loi du 18 avril*, 1851, Art. 528–536.

[5] *Codice di Commercio*, Art. 809–816.

[6] *Code de Commerce*, Art. 527, 528.

[7] *Loi du 18 avril*, 1851, Art. 536.

[8] *Codice di Commercio*, Art. 817, 818.

[9] *Konkursordnung*, § 190.

[10] *Concursordnung*, §§ 154, 66.

[11] Law of March 27th, 1881, Art. 87.

[12] *Bulletin de la Société de Législation Comparée*, 1885, p. 84; loi danoise, Art. 97; loi norvégienne, Art. 20.

he is restored to the management of his business and discharged from his liabilities upon the performance of certain stipulated conditions. It is usually agreed that the debtor shall be given an extension of time in which to meet his engagements, and shall be obliged to pay only a certain portion of his debts upon furnishing adequate security. If unanimity among the creditors was necessary for the purpose, it would be almost impossible to obtain a satisfactory arrangement. The will of the majority is, therefore, made to bind the minority, but to prevent injustice to individuals the rights of the minority have been safe-guarded as far as practicable.

The regulations of the French Code contained in articles 504 to 526 are lucidly expounded in M. Goirand's *Commentary*, to which I am largely indebted. Within three days after the expiration of the time granted for the verification and admission of claims, a meeting must be called to decide upon this question. The meeting is composed of the creditors, the syndic, the judge-commissary and the registrar of the court. The syndic renders a report upon the causes and present condition of the bankruptcy, the measures which have already been taken, the nature and amount of the assets and liabilities, and the probable dividend payable to the creditors if they proceed with the liquidation. The composition is granted upon a vote of the majority of the creditors representing three-fourths of the totality of debts proved or provisionally admitted, and confirmation by the Tribunal of Commerce; and can never be granted to a fraudulent bankrupt. The creditors who have proved their debts, and those whose claims are contested but have been admitted provisionally, may participate in the vote. No delay is allowed for the benefit of creditors resident abroad, notwithstanding the composition is obligatory upon all creditors, whether they have voted or not. Privileged and secured creditors have no vote, since their interests are sufficiently protected. But the secured creditors may, if they choose, relinquish their securities and join in the vote on an

equal footing with the ordinary creditors, or if they have several claims, some secured and some unsecured, they may participate in the vote to the extent of the latter without surrendering their securities for the former. Since the composition compels the opposing creditors to accept what may be a very considerable reduction in their claims, the French legislation provides for their protection the safe-guard of a double majority, a majority in number so that the will of one or several important creditors shall not be imposed upon the others, and a majority of three-fourths in value so that the small creditors may not subject the others to heavy losses. From the requirement of a double majority, three possible results may arise; for both, neither, or but one of these majorities may be obtained. In the first case, the composition must be signed at once, so that there will be no opportunity to procure signatures by wrongful means. In the second case, the creditors are declared by the judge-commissary to be in a state of union (*en état d'union*). In the third case, the meeting may be adjourned for a week, because it is presumed that in the meantime the bankrupt will modify his original propositions, and at the future meeting will reach an understanding with his creditors. By the majority in number is meant, not the majority of those present at the meeting, but of those whose debts have been admitted, and the majority of three-fourths in value is calculated upon the total amount of claims proved or provisionally admitted.

To the minority composed of dissenting and non-resident creditors, another protection is offered by the provision that the composition, although it has been regularly voted, will not be effective until it has received the *homologation* or confirmation of the court. Application may be made to the court by any of the parties, and opposition may be entered against it by any of the creditors who were entitled to vote upon the composition, or whose claims were admitted after the voting of the same. The judge-commissary having rendered a report upon

the situation of the debtor's affairs, giving his opinion as to the advisability of the composition, the court either grants or refuses its approval but can never alter the composition itself. The court's refusal may be based upon irregularities in the procedure, or upon grounds of public policy, if in the opinion of the court the conduct of the debtor has been reprehensible —if, for example, he has lived extravagantly, or, with knowledge of his insolvency, has adopted ruinous measures to prolong his credit. In the interest of the creditor the composition may be rejected if the dividends promised seem to be too small, or in the interest of the debtor, if he has assumed obligations greater than his means warrant. If the debtor is being prosecuted criminally for fraudulent bankruptcy, the creditors must await the termination of proceedings before taking any action other than to refuse a composition, and one already voted will become null and void if the debtor is subsequently convicted. A simple bankrupt, upon the other hand, is not disqualified for obtaining a composition.

2) *The Effects of the Composition.* The bankrupt is restored to the management of his estate, his position is improved, and his creditors may sue individually to enforce the provisions of the composition.

a) The functions of the syndics cease, and they must render their accounts to the bankrupt and deliver to him his books, papers, *etc.* Since the creditors may, if they prefer, require the appointment of an agent empowered to manage the estate until the conditions of the composition have been entirely performed, the dispossession or *dessaisissement* may not be completely terminated.

b) The bankrupt is generally released by his creditors from a portion of his debts and allowed an extension of time in which to pay the balance. The portion remitted, however, is considered a "debt of honor," which is recognized by law. If, for instance, the bankrupt voluntarily pays the debt in full, he can not recover the excess as money not owed (*indebitum*).

The doctrine of the English Common Law upon this point, it will be remembered, is that such an unpaid debt of a discharged bankrupt affords a sufficient moral consideration to support a new promise to pay.

The existence of this "debt of honor" will also prevent the judicial rehabilitation of the debtor, *i. e.*, the removal by decree of court of the various incapacities resulting from bankruptcy. The creditors do not lose their rights against the debtor's sureties for the whole amount of their claims, since it was to guard against the debtor's default that sureties were demanded.

c) The creditors regain their right to sue within the limits authorized by the composition, and ample security is given them by the fact that the creditors' mortgage over the realty of the debtor remains in force until the conditions of the composition have been fulfilled.[1]

3) *Cancellation of the Composition.* It may be set aside,

a) For a cause existing at or before the confirmation.

b) For a cause arising subsequently.

c) By a new bankruptcy.

a) If a fraud, as for instance the concealment of assets or the exaggeration of liabilities, is found to have existed when the composition was granted, there is ground for its cancellation.

b) The cause, such for example as the failure to perform the stipulations of the composition, may have arisen subsequently. The cancellation may only be demanded by those in regard to whom the debtor is in default, but when once decreed it is binding on all.

c) It may happen that the debtor, after resuming control of his affairs, contracts new debts, which he is unable to pay, and these new creditors may then obtain a second adjudication of bankruptcy, which will *ipso facto* revoke the composition.

(4) *Consequences of the Cancellation.* By the revocation the

[1] *Code de Commerce*, Art. 545.

debtor is deprived of the control of his estate and bankruptcy is reopened, use being made as far as possible of the former proceedings. If the cancellation has been obtained for any cause other than fraud, a new composition may be obtained, otherwise the creditors are in a state of union. It then becomes a question whether the debtor is to be in the same position as if the former bankruptcy had never been interrupted. An affirmative answer to this question would of course invalidate many acts done by innocent third parties under the composition. The law has rejected this solution as being harsh, and provides[1] that acts of the debtor since the confirmation, and before the cancellation of the composition, are valid, except in case of fraud, and third parties who have dealt with the debtor during this period are also protected and their acts maintained.

At this period there will arise a question as to the position of the creditors who become parties to the composition. What amount are they entitled to receive under the renewed bankruptcy? "If they have received a dividend," says article 526, "they may prove for the proportion of their original claim which corresponds to the proportion of the percentage promised which has not yet been paid." In other words, suppose my original claim was for 80,000 francs, and I have received under the composition 10,000 francs. In the new bankruptcy I am promised a dividend of 25 per cent., which, calculated upon the original claim, would be 20,000 francs. I may not prove a claim for 70,000 francs, the unpaid portion of my original claim, but for only 40,000 francs, the proportion of the original claim corresponding to the portion of the percentage promised which has not yet been paid, since 20,000 francs is the percentage promised and 10,000 francs is the portion not yet paid. The proportion may be stated as follows:

20,000 : 10,000 : : 80,000 : 40,000.

As against the bankrupt, however, the cancellation revives

[1] *Code de Commerce*, Art. 525.

the former rights of the creditors, and the payments received are regarded only as payments on account.

Another class of persons affected by the cancellation are the sureties of the composition. By article 520 cancellation for fraud existing anterior to the composition, or consequent upon a conviction for fraudulent bankruptcy, liberates the sureties *ipso facto*. But cancellation for causes subsequently arising, *i. e.*, the non-execution of the stipulated conditions, does not discharge the sureties, because they have guaranteed the fulfillment of the composition, and the creditors should not be deprived of this guarantee when the emergency has arrived against which they have attempted to protect themselves.

The regulations of the French Code upon the subject of the ordinary composition have been stated somewhat in detail, because those of the other Continental legislations are substantially the same.

II. *Composition in other European Countries.*

It is provided by the Italian Code[1] that a composition may proceed from the totality or from a majority of the creditors whose claims represent in value three-fourths of the total amount due (Art. 833); and the sentence of homologation which must issue from the court before the composition is effective may declare that after the conditions of the composition have been completely executed the name of the debtor shall be erased from the list of bankrupts (Art. 839). In other words, a discharge under the composition will operate as a rehabilitation. This is not true in French law, for a rehabilitation will not be pronounced as long as there remain any "debts of honor." Nothing short of payment in full can restore a bankrupt to his former position. In Italy, as in France, the cancellation of the composition may be pronounced by the court upon the demand of the creditors (Art. 843).

[1] *Codice di Commercio*, Art. 830–845.

In Spain we also find the ordinary composition.[1] Fraudulent bankrupts are debarred from its benefits.[2] Creditors having privileges or securities may, if they choose, surrender them and participate in the composition as ordinary creditors.[3] The method of voting it, the opposition that may be made to it, and its effects, are all regulated in detail.

In Belgium[4] the bankrupt, after he has complied with the requirements of the law and presented the basis of a composition, may demand a meeting of his creditors, and after verification of the claims obtain a composition by the concurrence of a simple majority in number of his creditors whose claims have been proved or provisionally admitted representing three-fourths of the total amount due.

In both Germany and Austria, a composition may terminate a bankruptcy; but it is to be noted that by the Austrian law it may be granted only to traders or commercial debtors. In this respect, as we have already said, the Austrians have not assimilated the bankruptcies of traders and non-traders.

According to the Hungarian law,[5] the propositions made by the bankrupt are laid before the commissioner and by him transmitted to the committee of the creditors, which decides, after having heard the syndic, whether they are to be submitted to the entire body of creditors in general assembly. The dividend promised must not be less than 40 per cent., (Art. 200) and the double majority required is one of two-thirds in number of the creditors present either personally or by their representatives, and of four-fifths in value calculated upon the entire body of the verified claims (Art. 212). The composition, as elsewhere, requires the confirmation of the court and the grounds upon which this may be refused are as follows:

[1] *Código de Comercio*, Art. 898–907.

[2] *Código de* 1885, Art. 898; *Código Antiguo*, Art. 1148.

[3] *Código de* 1885, Art. 900; *Código Antiguo*, Art. 1155.

[4] *Loi du 18 avril*, 1851, Art. 509–527.

[5] *Law of March 27th, 1881; Annuaire de Législation Etrangère. 1882*, p. 330.

a) For failure to observe the forms and conditions prescribed by the law.

b) When in order to obtain the votes of creditors, the bankrupt has collusively granted advantages to some at the expense of others.

c) When the court deems it prejudicial to the entire body of creditors. (Art. 217.)

There are also certain other cases where it is the bankrupt's own conduct that renders him unworthy of this privilege. For instance, he may have fled to escape his creditors, or have been convicted of fraudulent bankruptcy, or, being a merchant, he may have refused to produce his accounts or affirm them by oath as required, or he may have kept them in so defective a manner that they fail to disclose the condition of his affairs. If the debtor has already been through bankruptcy or obtained a composition, or refused to take an oath that he has not been guilty of concealing his assets or exaggerating the amount of his debts, confirmation will be refused. (Art. 200.)

A conviction for fraudulent bankruptcy subsequent to the formation of the composition involves the loss to the debtor of the benefit of any reductions which have been allowed him, while the creditors still retain any rights they have acquired. (Art. 229.)

Within a period of five years from the confirmation by the court, it is open to any creditor to demand that the debtor shall forfeit the reductions allowed him. The creditor who makes this demand must prove that the debtor has concealed a part of his assets or exaggerated his liabilities, or that to obtain the necessary majority he has offered special advantages to certain creditors, and the demandant must further show that he was not in a position to prove these facts before the judgment of confirmation. (Art. 230.)

The English law[1] provides that where a debtor is adjudged bankrupt the creditors may, if they think fit, at any time after

[1] *Statutes 46 and 47 Victoria*, c. 52, § 23 (1).

the adjudication, resolve to entertain a proposal for a composition in satisfaction for the debts due to them under the bankruptcy, or for a scheme of arrangement of the bankrupt's affairs, and that if the court approves the composition or scheme, it may make an order annulling the bankruptcy and vesting the property of the bankrupt in him or in such other person as it may appoint, on such terms and subject to such conditions as it may declare. In case of default on the part of the debtor, of fraud or for other sufficient cause, the composition may be annulled.

In the same connection we may mention an institution peculiar to the English legislation, *i. e.*, the order of discharge, to which there is nothing on the Continent strictly analogous. In France and the other Continental countries, it is true, the debtor may obtain the remission of a part of his debts, and it is generally for this purpose that he proposes a composition. But a composition may be granted only with the concurrence of at least a simple majority, and in some countries of a still larger proportion of his creditors, and the court may then either approve or reject it. Furthermore in no case may the court grant such a privilege to the debtor *proprio motu*, nor may it ever modify the composition adopted by the creditors. In England, much larger powers are conferred upon the court in this matter. When the debtor has paid a portion of his debts, it may discharge him from the remainder without necessarily obtaining the consent of the creditors. This institution dates from the reign of Queen Anne. Previous to that time the English bankrupt laws, beginning in the reign of Henry VIII., had been extremely rigorous. Their main object had been to secure an equitable distribution of the assets and to impose often very severe penalties upon the debtor. Since the commencement of the eighteenth century the English legislature has bowed in recognition to a higher law and has let "mercy season justice." Its legislation has adopted the idea that when men enter commerce, which is based upon credit,

they assume mutual risks; that a perfectly honest man may be the victim of a combination of circumstances beyond his control; and that it is just and expedient as well as merciful to offer such a man a means of escape from misfortune, and not to leave him exposed to the suits of relentless creditors who ought properly to bear their proportionate share of the common disaster. These ideas have culminated in the law of 1883,[1] according to which the court may entertain a request for a discharge at any time after the close of the public examination of the debtor, which immediately follows the "receiving order." At the examination, in which the debtor, his creditors, and the official receiver take part, the debtor's conduct and the causes of his embarrassment are investigated. The court, having been thus furnished with information upon which to base a judgment, may either grant an absolute order of discharge, or, if the debtor has been guilty of various negligent or wrongful acts—such as failing to keep proper books of account, trading after knowledge of his insolvency, committing acts either actually or constructively fraudulent—may refuse the order, or else it may pursue a middle course by suspending the operation of the order for a specified time, or by granting it subject to certain conditions in respect to any property he may subsequently acquire. As an illustration of such a condition, the court may require the debtor to consent to judgment being entered against him by the "official receiver" or the trustee for any balance of the debts provable under the bankruptcy, that remain unsatisfied at the time of the discharge. The absolute order of discharge releases the bankrupt from the unpaid residue of all debts provable under the bankruptcy except those which he incurred by means of fraud, or breach of trust, or those of which he obtained forbearance by means of fraud, and also except debts due on recognizances, or due to the crown or relating to the revenue. He will be released from the latter, however, if the Treasury certify its consent in writing to the dis-

[1] *Statutes 46 and 47 Victoria*, c. 52, § 28.

charge. If the court thinks that the debtor has been entirely blameless, he will be relieved of any incapacities that have resulted from the bankruptcy. A debtor who has received his discharge is restored to an equal credit with a person who has never been adjudged bankrupt, but if he fails to obtain this order, the case is quite different. To guard the public against fraud, the law declares a man guilty of a misdemeanor if he obtains credit from any person, to amount of £20 or more, without informing such person that he is an undischarged bankrupt.

There are still other points in which the order of discharge differs from the composition as it exists in France and other countries on the Continent. For example, it does not reinstate the bankrupt in the conduct of his affairs, or terminate the administration of the trustee. Again, in the composition there is always an implied condition that it will be cancelled if the debtor fails to carry out its provisions, while the order of discharge is subject only to such conditions as the court imposes, and may even be absolute.

The ordinary composition is also one of the four methods in which bankruptcy may close in Norway and Denmark.[1] In those countries the bankrupt laws are applicable to both traders and non-traders, but it is only the trader, manufacturer, or ship-owner—in Norway, also the owner of a mine—who may demand a meeting of his creditors to deliberate upon the expediency of granting him a composition.[2] But in certain cases the law forbids it even to these persons:

a) When the debtor has already passed through bankruptcy, unless according to the Danish law (Art. 101, a) he proves that he has paid his creditors 75 per cent., or according to the Norwegian law 60 per cent., or unless he proves that his former bankruptcy occurred without his fault.[3]

[1] *Bulletin de la Société de Législation Comparée*, 1885, p. 84.
[2] *Ibid.*, loi danoise, Art. 100; loi norvégienne, Art. 60.
[3] *Ibid.*, loi du 3 juin, 1874, § 6 a.

b) When the debtor absents himself from the bankruptcy proceedings, unless he has obtained permission from the *skifteret*.[1]

c) When the debtor refuses without reasonable excuse to prepare the statement of the condition of his affairs which the law prescribes, or refuses to give the information required of him.[2]

d) When he has not kept his books regularly.[3]

e) When he is prosecuted criminally for fraudulent bankruptcy, and, in Denmark, even when the *skifteret* thinks he has prejudiced his creditors by carelessness of conduct—not sufficient perhaps, to sustain a public prosecution.[4]

f) When, in Denmark, he has neglected to declare his bankruptcy in the case where the law imposes this duty.[5]

As regards the procedure to be followed, the debtor must address written propositions for a composition to the *skifteret* within the period fixed for the production of claims.[6] In Norway, propositions for a composition cannot be considered subsequently to this period except in the case of a debtor who having been under criminal prosecution has been finally acquitted (Art. 73). In Denmark, on the other hand, the debtor may make these propositions at any time before the final distribution of the assets, provided he gives to the *skifteret* the consent in writing of a simple majority in number of his creditors representing more than one-half the value of the claims produced. (Arts. 101, 103.) The propositions must be published, and the discussion upon them takes place usually in

[1] *Ibid.*, loi danoise, Art. 101 b; loi norvégienne du 3 juin, 1874, § 6 b.

[2] *Ibid.*, loi danoise, Art. 104 c; loi norvégienne du 3 juin, 1874, § 6 c.

[3] *Ibid.*, loi danoise, Art. 101 f; loi norvégienne du 3 juin, 1874, § 6.

[4] *Ibid.*, loi danoise, Art. 101, d, e; loi norvégienne du 3 juin, 1874, § 6.

[5] *Ibid.*, loi danoise, Art. 101 g. The case in which he is bound to declare his own bankruptcy is where, being a trader, the balance-sheets prepared by him within the last three years disclose each time a deficit of more than 30%.

[6] *Ibid.*, loi danoise, Art. 102; loi norvégienne, Art. 61.

the meeting of the creditors appointed for the verification of claims. By the notices sent out for this meeting the creditors are apprised that this question will probably be considered. After the claims have been verified, the debtor, either personally or by attorney, makes his propositions, and the administrator renders a report upon the condition of the bankruptcy, expressing his opinion as to the advisability of granting a composition.[1] As in other legislations, privileged and secured creditors may participate in the vote only to the amount of their unsecured claims.[2] The Danish law provides expressly that the right to vote shall be withheld from creditors who are related to the debtor by blood or marriage to the degree of cousin-german (including the spouse of each such relation), or to whom claims have been assigned since the opening of the bankruptcy. On the other hand, the right is granted to creditors whose claims are contested;[3] and if the result of the vote depends on whether these creditors are admitted or not, the *skifteret* after consultation with the administrator examines the doubtful claims, and determines whether they shall be admitted for the purpose of this vote, without prejudice otherwise to their validity. If the *skifteret* thinks that such provisional admission of these claims is impossible, the composition is rejected.[4]

In their modes of calculating the majorities requisite for the acceptance of the composition, these two countries disagree. By the Danish law, there must be a simple majority in number of the creditors present, and a majority of three-fourths in value, while if the terms of the composition do not give the creditors at least fifty per cent. of the amount due them, a majority of three-fourths in number is necessary. (Art. 108, 109). In Norway, on the other hand, there is required either

[1] *Ibid.*, loi danoise, Art. 102, 103; loi norvégienne, Art. 62, 63.

[2] *Ibid.*, loi danoise, Art. 105; loi norvégienne, Art. 64.

[3] *Ibid.*, loi danoise, Art. 107; loi norvégienne, Art. 74.

[4] *Ibid.*, loi danoise, Art. 110; loi norvégienne, Art. 7 d.

the consent of all the creditors present representing two-thirds of the claims, or a majority of three-fourths in number and value. (Art. 65).

If the composition is accepted, a new meeting is convened, in which dissatisfied creditors may within a certain time present their objections.[1] In this meeting, also, the *skifteret* decides whether he will confirm it or not.[2] In Denmark (Art. 118) the court is not made a judge of the advisability of the composition; it may only refuse its confirmation for an irregularity in procedure or because it contains stipulations contrary to the rights of creditors as secured by Articles 111 to 115 of the law.[3]

By the Norwegian law (Art. 68–70) the *skifteret* has power to examine whether the composition is for the interest of the creditors, but he must refuse to confirm it if it does not grant to all the creditors the same rights, unless they have consented to the inequality. The difference in the treatment of traders and non-traders again appears in the Norwegian law, which provides (Art. 77) that in the bankruptcy of non-traders, any contract entered into between the debtor and his creditors releasing a part of his debts, or granting an extension of time for their payment, may not be confirmed by the *skifteret*, and is obligatory only upon those creditors who have given their consent. This is also the ordinary rule in all cases where there has been any irregularity in the procedure which has to be followed to obtain a composition.

[1] *Ibid.*, loi danoise, Art. 117; loi norvégienne, Art. 67.

[2] *Ibid.*, loi danoise, Art. 116; loi norvégienne, Art. 66.

[3] Article 111: Privileged creditors may not be compelled to make any reduction or postponement of their claims. Creditors who stand in the same rank must be treated similarly, unless their consent is obtained to the contrary.—Article 112: Creditors whose claims are not acknowledged, must in the composition be treated temporarily as if their rights were not disputed.—Article 114: Secured creditors may not be affected by the composition as regards their securities.—Article 115: Any stipulation is null and void that accords to a creditor more advantages than those which have been publicly granted to him in the composition.

From a judgment refusing the confirmation of the composition, either the bankrupt or a majority of the creditors may appeal.[1] But no appeal is given from a judgment confirming it in Norway (Art. 131), nor as a rule in Denmark (Art. 139), although in the latter country there are certain exceptions, (Art. 117). According to the Danish law (Art. 119) the composition has the effect of a judicial compromise between the debtor and his creditors, and binds even those who have not produced their claims unless they are privileged or secured creditors.[2] The debtor is released from the portion of his debts not assumed by him,[3] but the creditors still retain their rights against his sureties and co-obligees.[4] The debtor's property is not restored to him unless the composition provides that it shall be.[5] By the Danish law (Art. 121) it is the duty of the *skifteret* to see that preferred creditors receive entire satisfaction. The administrator must render his account or lose his right to his fees.[6] Provision is also made for subsequently discovered fraud, for if within the three years following the confirmation it is ascertained that the debtor has been guilty of certain fraudulent acts, or has given special advantages to individual creditors to obtain their votes, he will be obliged to pay all the creditors who are innocent of the fraud their entire claims, including the portions from which he had been released. The creditors, however, preserve all the rights granted them by the composition, and the sureties are not discharged from their obligations.[7]

It will be seen that the validity of the composition depends everywhere upon the concurrence of a double majority, but

[1] *Ibid.*, loi danoise, Art. 138; loi norvégienne, Art. 132.

[2] *Ibid.*, loi danoise, Art. 120; loi norvégienne, Art. 69.

[3] *Ibid.*, loi danoise, Art. 120; loi norvégienne, Art. 71.

[4] *Ibid.*, loi danoise, Art. 113; loi norvégienne, Art. 74.

[5] *Ibid.*, loi danoise, Art. 121; loi norvégienne, Art. 68.

[6] *Ibid.*, loi danoise, Art. 122; loi norvégienne, Art. 72, 86.

[7] *Ibid.*, loi danoise, Art. 123; loi norvégienne, Art. 76.

these majorities vary in the different countries. To recapitulate:

France—A simple majority in number; three-fourths in value.

Belgium—A simple majority in number; three-fourths in value.

Italy—A simple majority in number; three-fourths in value.

Spain—A simple majority in number; three-fifths in value.

Germany—A simple majority in number; three-fourths in value.

Austria.—Two-thirds majority in number; three-fourths in value.

Hungary—Two-thirds majority in number; four-fifths in value.

England—A simple majority in number; three-fourths in value.

Norway—All in number; two-thirds in value: or, three-fourths majority in number; three-fourths in value.

Denmark—A simple majority in number; three-fourths in value.

In every country, it is to be noticed, the composition must receive the approval of the competent judicial authority. In England, the order of discharge issues in first instance from the court itself.

§ 3. *Composition by Relinquishment of Assets, or "Concordat par Abandon."* This is a combination of the ordinary composition after bankruptcy and the "state of union" of the creditors which will be described in the following section. It was introduced into the French system by the law of July 17th, 1856,[1] and has been followed by the new Greek Code[2], and by the law of May 6th, 1882, in Brazil.[3] It consists in an arrangement between the debtor and his creditors, by

[1] *Code de Commerce*, Art. 541.

[2] *Annuaire de Législation Étrangère*; 1879, p. 673.

[3] *Annuaire de Législation Étrangère*, 1879, p. 736.

which the debtor receives a total or partial discharge upon surrendering the whole or a part of his assets. It is formed according to the regulations prescribed for the ordinary composition, produces the same effects, and is cancelled in the same way, but the liquidation and distribution of the assets are effected as in the case of "union" or the ordinary procedure in bankruptcy:

§ 4. *Union of the Creditors and Closing by the Final Distribution.* The closing of the bankruptcy in the normal way, *i. e.*, by the liquidation and equitable distribution of the debtor's assets, is called in France the "union of the creditors" (*l'état d'union*) corresponding to the final winding up of the estate in the English law. Whenever for any reason a composition has not been obtained, the creditors are *ipso facto* in a state of union, *i. e.*, without the necessity of any judicial decree to that effect. The judge-commissary must immediately call a meeting of the creditors, in which—otherwise than in the meeting called for deliberation on a composition—privileged and secured creditors may participate. At this meeting, three questions must be determined. In the first place the creditors are consulted upon the advisability of retaining the present syndics or replacing them by others.[1] A report of the views of the creditors on this point is prepared by the judge-commissary and presented to the tribunal with which rests the ultimate decision. Secondly, the opinion of the creditors must be taken as to granting an allowance to the bankrupt for the support of himself and family. (Art. 530). If this is decided in the affirmative, the syndics propose the amount, which is determined finally by the judge-commissary in accordance with the need of the bankrupt and the condition of his affairs. Finally, the creditors must decide whether the syndics shall wind up the estate at once or continue the bankrupt's business. (Art. 532). So long as there was a possibility that a composition might be granted and the debtor

[1] *Code de Commerce*, Art. 529.

restored to the conduct of his affairs, the business has not been interrupted; but since its further continuance may impair the estate, authorization from the creditors must be obtained for this purpose. The resolution conferring the authority upon the syndics determines its duration and extent, and the amount they may retain in their hands for the necessary current expenses. The bankrupt or the dissenting creditors may oppose this resolution, but pending appeal the business is continued. The syndics act only in a representative capacity, and the profits realized accrue to the benefit of the estate, which in turn must bear the losses. There is one exception to this general rule. When the syndics, with the authority of the creditors, have entered into engagements which the estate is unable to meet, the creditors who authorized these transactions are personally responsible, but only within the limits of the authority which they have given. (Art. 533.)

When these questions have been decided, the syndics proceed to the liquidation of the estate under the supervision of the judge-commissary, without necessarily summoning the bankrupt (Art. 534). For this purpose they may institute and defend suits. To avoid needless expense and delay the syndics, after summoning the bankrupt, may enter into compromises in regard to claims belonging to him; but if the amount involved is more than 300 fr., they must obtain the approval of the Tribunal of Commerce for compromises relating to personalty, and of the Civil Tribunal for those relating to realty, and this approval will not be granted in the case of real property if the bankrupt opposes the compromise. (Art. 535, 487.) Barring hypothecary creditors who have begun proceedings before the "union" was established, the syndics alone can sell the bankrupt's realty, and only with the authorization of the judge-commissary. The sale is made under the supervision of the court of the place where the property is situated, and in accordance with the forms prescribed for the sale of the property of minors. It is made by public auction and is only pro-

visional, for any person, whether a creditor or not, may procure a re-sale on condition that he declares his intention within a fortnight to the Registrar of the Civil Tribunal of the place where the property is situated (under whose supervision the first sale was made), and offers in addition to the price first obtained the tenth part of that price. This second sale is final (Art. 573).

When the assets and liabilities have been ascertained, the distribution among the creditors follows (Art. 565). The costs and expenses of the administration of the estate must be paid, then the allowance granted for the support of the bankrupt and his family, and finally the privileged creditors must be satisfied. The residue constitutes the fund to be distributed *pro rata* among the general creditors (Art. 565). The first dividend is usually made before the assets are entirely realized. As new assets come in, further distributions are ordered from time to time by the judge-commissary, who is kept apprised of the condition of the estate and the amount of money on deposit in the *Caisse de Depôts et Consignations* by the monthly report which the syndic is obliged to render (Art. 566).

In the absence of special provisions, a question would arise as to the disposition to be made of contingent claims and of claims that are disputed or belong to foreign creditors. The law meets this by providing that creditors holding contingent claims shall share in the dividends like ordinary creditors, but they must give security for the restitution of the dividends they receive in case of the failure of the condition upon which their claims depend. The proportion due to creditors whose claims are disputed, or to foreign creditors, is set aside to await the final determination of their rights (Art. 567, 568).

The syndic, with the authorization of the judge-commissary, may at any time redeem property which a creditor may hold in pledge by paying the debt. A creditor who has failed to realize his entire claim by the sale of his pledge may be ad-

mitted as a general creditor for the deficiency, but so long as the creditor holds his pledge, he may not share in the general fund. (Art. 546–548.) If this were allowed, a dishonest man could receive a dividend and then abscond, taking with him the pledge.

At least once during the first year, and during the following years if necessary, the judge-commissary must call a general meeting of the creditors. (Art. 536.) The purpose of these meetings is to enable the creditors to exercise a general supervision over the syndics, to decide upon the advisability of retaining them in office or removing them, and to keep themselves informed in regard to the administration of the estate. When the operations of the bankruptcy have been completed, a final meeting of the creditors is held—at which the bankrupt must be present—to receive the accounts of the syndic, and also to pronounce their decision as to the *excusabilité* of the bankrupt. (Art. 537.)

This declaration of *excusabilité* has become an anachronism. Inasmuch as the termination of the "union" restores to the individual creditors the rights of action for the unpaid portions of their debts, the bankrupt, having been deprived of all property against which judgments might be executed, would *formerly* have been rendered liable to imprisonment. The purpose of the decree of *excusabilité* was to save from imprisonment an unfortunate and innocent bankrupt. A law of 1867, however, abolished imprisonment for debt, and since that time this decree, which formerly operated as an incentive to a debtor on the verge of insolvency to refrain from imprudent or fraudulent conduct, has had only a moral value. The *excusabilité* or *non-excusabilité* is pronounced ultimately by the Tribunal of Commerce, after it has been informed of the action of the creditors. Fraudulent bankrupts or those convicted of theft, swindling, or breach of trust, will never be declared excusable.

When the bankruptcy has been terminated by the "union," the debtor is not discharged from his unpaid debts. On the

contrary, any property which he subsequently acquires may be seized by the creditors, but they may not again make him a bankrupt on those old claims.

This method of closing the proceedings exists also in Belgium[1] and Italy.[2] The Italian Code, after declaring that when the distribution of assets has been completed the procedure is closed and each creditor returns to the exercise of his rights for whatever sums remain due to him, further provides that the procedure must be reopened when the debtor demands it after offering to pay his creditors at least one-tenth of their claims, and giving a bond for the expenses of the proceedings.[3] If the bankrupt can prove that he has paid all the claims admitted against the estate, he may obtain from the court the erasure of his name from the list of bankrupts. Certain debtors—fraudulent bankrupts, *etc.*—are not accorded this right.[4]

In neither the Spanish Code nor the English law is there any mention of the "union," although, as we have said, this situation answers to the winding-up of the estate under inspection in England.

In Germany and Austria, if the proceedings have not been interrupted by the composition (*Zwangsvergleich*)[5], or, after verification of the claims, annulled by the unanimous consent of the creditors,[6] they will be closed by a decree of the Court of Bankruptcy following upon the final distribution (*Schlussvertheilung*).[7]

In Hungary, the estate is liquidated, and the assets distributed according to the procedure which the law prescribes in detail. After the final division, bankruptcy will be closed by

[1] *Loi du 18 avril, 1851*, Art. 528–536.

[2] *Codice di Commercio*, Art. 809–816.

[3] *Ibid.*, Art. 815.

[4] *Ibid.*, Art. 816.

[5] Germany, *Konkursordnung*, § 160; Austria, *Concursordnung*, § 207 ff.

[6] Germany, *Konkursordnung*, § 188; Austria, *Concursordnung*, § 155.

[7] Germany, *Konkursordnung*, § 151; Austria, *Concursordnung*, § 159 ff.

a judgment of the court pronounced upon the report of the commissioner.[1] This state of things, it will be seen, corresponds to the "state of union" of the French law.

The distribution of the assets in default of a composition is likewise a mode in which bankruptcy may close in Denmark and Norway. The Norwegian law distinguishes expressly two phases of the bankruptcy procedure, the preliminary and final administration. During the preliminary administration the claims are produced and verified, and propositions are made for a composition. If it is decided that no composition is to be granted, the final administration begins, during which the assets are liquidated and divided. The details of procedure are laid down with great care by the law. Privileged creditors must first be satisfied.[2] If there is then remaining enough to make a dividend to the general creditors of ten per cent. of their claims in Denmark and five per cent. in Norway, such a division is made and renewed whenever it appears that a ten per cent. dividend can be paid.[3] Claims not yet due are admitted, a proper reduction being made on those that do not produce interest.[4] An amount sufficient to pay contested claims is held in reserve until the rights of their holder have been determined.[5] Creditors whose securities will certainly be sufficient to indemnify them may demand payment in full of so much of their claims as are due at the time of the partial distributions, the estate and not the holders of subsequent mortgages on the same property being in such case subrogated to their rights.[6]

[1] Law of March 27th, 1881, Art. 169–198; *Annuaire de Législation de Étrangère*, 1882, p. 330.

[2] *Bulletin de la Société de Législation de Comparée*, 1885, p. 88; loi danoise, Art. 124; loi norvégienne, Art. 95.

[3] *Ibid.*, loi danoise, Art. 124; loi norvégienne, Art. 96.

[4] *Ibid.*, loi danoise, Art. 131; loi norvégienne, Art. 102.

[5] *Ibid.*, loi danoise, Art. 125; loi norvégienne, Art. 96.

[6] *Ibid.*, loi danoise, Art. 130; loi norvégienne, Art. 101. In other words, let us

Before paying any dividends to the ordinary creditors, the curator, in a report to the *skifteret*, must announce whether the assets are sufficient to warrant one or more distributions.[1] The tribunal then prepares a scheme of division, which is given to the curator and which remains for fourteen days at the office of the clerk of the court, where it may be examined by interested parties. The *skifteret* may modify this scheme in accordance with any objections that are made, and it is then presented to the assembly of creditors. From this time on, changes may be made only by means of an appeal.[2] When the estate has been entirely liquidated, a final distribution is made, and the *skifteret* pronounces the closing of bankruptcy.[3] If any more assets are subsequently discovered, a new division will be made.[4]

No discharge is granted the debtor, for the creditors retain their rights against him for the part of their claims remaining unpaid after the several dividends.[5]

In Norway we meet with what corresponds to the decree of *excusabilité* in the French law, but since the Norwegians have not abolished imprisonment for debt, the decree has more than a moral value. The law declares that the creditors may not, for claims which have accrued prior to the opening of bankruptcy, cause the arrest of the debtor's person, if the *skifteret* on motion of the debtor, and after advising with the curator and the assembly, has pronounced, that it was due

suppose that there are a first and a second mortgage on the property and the first mortgagee has been paid his claim after surrendering his security. The second mortgagee will not be advanced, but will retain his position as second mortgagee, while the estate, assuming the position of first mortgagee, will exercise its rights over the property in the interest of the general creditors.

[1] *Ibid.*, loi danoise. Art. 135; loi norvégienne, Art. 97.

[2] *Ibid.*, loi danoise, Art. 126; loi norvégienne, Art. 97.

[3] *Ibid.*, loi danoise, Art. 133; loi norvégienne, Art. 105.

[4] *Ibid.*, loi danoise, Art. 134; loi norvégienne, Art. 107.

[5] *Ibid.*, loi danoise, Art. 135; loi norvégienne, Art. 106.

neither to the carelessness nor fraud of the debtor, but only to his misfortunes.

§ 5. *Closing for Insufficiency of Assets.* The fact that the assets will not prove sufficient to defray the necessary expenses incident to the proceedings may be discovered either before or after the declarative judgment has been rendered and the bankruptcy opened. In the former case, one of two possible courses may be pursued. Either the court must refuse to pronounce the judgment at all, or else the law must provide a gratuitous procedure.

Considering first in order the case where the poverty of the estate is disclosed after bankruptcy has been opened, we find that it is closed again for this cause in France,[1] Belgium,[2] Italy,[3] Germany,[4] Austria,[5] Hungary,[6] Norway and Denmark.[7]

By the French law, power is given to the Tribunal of Commerce to close the bankruptcy in such cases, but the effect of the judgment of the court is to suspend rather than to terminate it. Each creditor is restored to his individual right of action, it is true; but the debtor continues to be deprived of his property, and in other respects the bankruptcy is practically still in force. After the judgment has been pronounced, if no additional property is forthcoming, bankruptcy will continue until the debtor's death; but, if more property is found in the debtor's possession, or if he or his friends deposit with the syndics money enough to pay the costs of the proceedings, the tribunal will reverse its judgment and the suspended bank-

[1] *Code de Commerce*, Art. 527, 528.

[2] *Loi du 18 avril*, 1851, Art. 536.

[3] *Codice di Commercio*, Art. 817, 818.

[4] *Konkursordnung*, § 190.

[5] *Concursordnung*, § 154, 66.

[6] Law of March 27, 1881, Art. 87; *Annuaire de Législation Étrangère, 1882*, p. 330.

[7] *Bulletin de la Société de Législation Comparée*, 1885, p. 84; loi norvégienne, Art. 20; loi danoise, Art. 97.

ruptcy will be re-opened. The only advantage gained by a closing for insufficiency of assets by the French law is the restoration to the creditors of their rights of action; but even this is of less benefit to an individual creditor than would appear at first blush, for according to the opinion of M. Goirand in his *Commentary on the French Code of Commerce*, a creditor who during this period of suspension obtains from the debtor the payment of his claim must return the sum to the general mass. In other words, the right of action secured to an individual is to be exercised only in the interest of the general body of creditors. The condition in which the debtor and his creditors find themselves after a bankruptcy has been closed in this way must be classed, along with the decree of *excusabilité*, among those anachronisms resulting from the abolition in France of imprisonment for debt. When this institution was retained after it was no longer possible to obtain execution against the body of the bankrupt, it survived the reasons for which it was introduced into the law.

These remarks do not apply to closing for insufficiency of assets in Germany and Austria, because its effects are different from those in the French law. In those countries, the bankrupt is reinstated in the management of his affairs.[1]

In Hungary, this mode of closing falls under the more general head of annulment of bankruptcy. The court may decree this of its own motion, when in the course of the operations there is disclosed one of two facts, either of which if known would have prevented the adjudication, namely, the existence of but a single creditor, or an insufficiency of assets to defray legal expenses.[2]

In Norway and Denmark, the expenses of the procedure are charged primarily to the creditor who demanded the opening of bankruptcy. For his protection, the Danish law (Art. 97), permits him, as soon as the inadequacy of the assets be-

[1] Germany, *Konkursordnung*, § 192; Austria, *Concursordnung*, § 154.

[2] Law of March 27, 1881, Art. 87, 165.

comes apparent, to petition the *skifteret* to have the bankruptcy closed, so that the expenses may not fall upon his shoulders.

In neither the Spanish nor the English law do we find any mention of closing the proceedings for this cause.

Although it is not properly within the scope of this chapter, I shall digress for a moment to refer to gratuitous procedure in bankruptcy.

Where it is clear from the outset that there is nothing wherewith to discharge the preliminary expenses, it is nevertheless desirable that the procedure be continued so that notice may be given to the creditors, and, if there is any property as yet unknown or concealed, it may be discovered. With this purpose in view, two countries, France and Belgium, have organized a gratituous procedure.

The provisions of the French law on the subject are very meagre, and are embodied into Article 461 of the law of May 28th, 1838, by which the book upon "*Faillites et Banqueroutes*" in the Code of Commerce, as it stood at that time, was modified. It reads:

"When the assets of the bankrupt are insufficient to defray immediately the expenses of the judgment declaring the bankruptcy, the publication and advertisement of the judgment in the newspapers, the placing of seals, and the arrest and incarceration of the bankrupt, the amount necessary shall by order of the judge-commissary be advanced by the Treasury, to be repaid as a first charge out of the first assets received, but without prejudice to the priority of the landlord of the bankrupt."

It will be seen that this gratuitous procedure is incomplete, since it makes provision only for the preliminary operations of bankruptcy, but does not prevent the proceedings from being interrupted at a later period for lack of assets.

In Belgium, where the Code Napoleon had been adopted, there was no law of this kind until two members of the Chamber of Representatives—MM. Dansaert and Demeurle—following the example of the French law of 1838, proposed in

1879 a plan that became a law in 1882.[1] This law is much more complete than the French, and differs from it in two important particulars. In the first place, the gratuitous procedure in France results from an order of the judge-commissary, whereas in Belgium it may be ordered only by the court, either of its own motion or at the request of the curator, and either by the judgment declaring the bankruptcy or by a subsequent judgment. In the second place, according to the French law, all the expenses, including the fees and expenditures of the agents of the bankruptcy, are advanced by the Treasury. In Belgium, on the contrary, the officers of the court must give their services gratuitously, unless there shall be eventually sufficient funds to pay them in the order provided by Article 5 of the law as follows: The disbursements of the curators, the services of the justices of the peace, of the clerk of the justice, of the clerk of the Tribunal of Commerce, of the attorneys and of the process-servers, and the fees of the curators. If there are several claims of the same class, they are paid proportionally. The only expenses that are advanced by the Treasury are those incident to the insertion in the newspapers of the declarative judgment of bankruptcy.[2]

Although a gratuitous procedure has never been introduced into England, yet in the provision made for what are called "small bankruptcies," we find something analogous. Since

[1] *Loi du 26 décembre, 1882, sur procédure gratuite de faillite.*

[2] The text in full of Article 5 is as follows:

Si l' actif est insuffisant pour couvrir tous les frais résultants des formalités, procédures et actes énumérés dans les articles 1 et 2, ils sont remboursés par privilége dans l'ordre suivant:

1°. Les avances faites par le Trésor, du chef d' insertions dans les journaux;

2°. Les debours des curateurs;

3°. Les actes et vacations des juges de paix, du greffier du juge de paix, du greffier du tribunal de commerce, des avoués et des huissiers;

4°. Les honoraires du curateur;

5°. Les droits dus au Trésor public.

S' il y a concours dans le même ordre, le payement se fera au marc le franc.

the expenses incident to the less important bankruptcies are often relatively greater than those of the more important, the English legislature has attempted to simplify the procedure in the former cases and reduce the expenses to a minimum. Small bankruptcies are defined as those of which the assets will not in all probability exceed £300.[1] For these cases the court may make an order that the debtor's estate be administered in a summary manner, and thereupon the ordinary rules will be modified, as follows:

1) The official receiver performs the functions of trustee unless the creditors exercise the right they possess of appointing at any moment a trustee of their own choice, in which case the bankruptcy will proceed as if an order for summary administration had not been made.

2) There is no committee of inspection, but the official receiver must obtain from the Board of Trade authorization for those acts which ordinarily require the consent of the committee of inspection.

3) The rules prescribed for carrying the law into effect in ordinary bankruptcy may be modified, in order to simplify the procedure and decrease the expenses. This last provision, however, is limited by some exceptions. For example, the rules in regard to the public examination of the debtor and to the order of discharge may neither be dispensed with nor altered.

§ 6. *Annulment of the Bankruptcy.* In most countries, if for any reason it appears that bankruptcy should never have been declared, or if during the course of the proceedings the debtor proves that he is solvent, or that he has paid his debts in full, the court will, by its decree, annul the bankruptcy.

[1] *Statutes 46 and 47 Victoria*, c. 52, § 121.

CHAPTER V. THE REHABILITATION OF THE BANKRUPT.

Bankruptcy in all the European countries inflicts upon the debtor certain disabilities of either a civil, commercial or political nature, which may survive even a decree of *excusabilité* or the fulfillment of a composition. The province of a rehabiliation is to restore the debtor to all the rights of which he has been deprived by the adjudication of bankruptcy. The conditions that must exist to entitle the bankrupt to this privilege are not uniform throughout all the legislations. In one group of countries, embracing France, Belgium, Spain, Italy and the Netherlands, the general principle is that the debtor must pay all his debts in full, principal, interest, and costs, before he may be rehabilitated. In another group, including Germany and Austria, it may be said, speaking very generally, that the closing of bankruptcy removes the disqualifications of the debtor, or in other words has the effect of a rehabilitation. In England, a middle course is adopted and the debtor is relieved of these incapacities, either when the bankruptcy has been annulled because in the opinion of the court it ought not to have been opened, or it has been proved to the court that the debts of the bankrupt have been paid in full, or when an order of discharge has been obtained from the court by the debtor with a certificate to the effect that his insolvency was caused by misfortune without any misconduct on his part.

In the first group of countries, exceptions will be found to the general principle. Thus in Spain and Italy, the debtor to whom a composition has been granted may be rehabilitated when he has fulfilled its conditions, while in the Netherlands the court may on granting the homologation of a composition

rehabilitate at once the unfortunate bankrupt who has acted in good faith. To give with any degree of accuracy the actual state of the law, a careful study is necessary. We shall now examine more in detail the different laws.

In France[1] and Belgium[2] a debtor is not entitled to a rehabilitation unless he has paid his debts in full, principal, interest, and costs, even those from which he has been released by the terms of a composition. He is also debarred if he is a fraudulent bankrupt, or has been condemned for theft, swindling, abuse of confidence, or fraudulent sales (*stellionat*),[3] or if being a guardian, administrator or other accountant, he has not rendered or settled up his accounts. A simple bankrupt (*banqueroutier simple*) may be rehabilitated after he has suffered the punishment to which he has been condemned.

In Spain, under the old code of 1829, as we have seen, there were five kinds of insolvency, suspension of payments, casual, culpable, and fraudulent insolvency, and *alzamiento*. Those of the first two classes to whom a composition had been granted might obtain a rehabilitation after they had performed its stipulations. From those of the first two classes who had not obtained a composition, and from culpable insolvents after they had suffered their punishment, a payment in full of their debts was required.[4] Fraudulent bankrupts and *alzados* were never rehabilitated.[5] In the code of 1885, the classes have been reduced to three,—casual, culpable, and fraudulent insolvency. All who have obtained a composition may be rehabilitated when

[1] *Code de Commerce*, Art. 604, 612.

[2] *Loi du 18 avril*, 1851, Art. 586, 591.

[3] *Stellionat* is committed when a person sells or mortgages an immovable, of which he knows he is not the owner, when he presents, as free from encumbrances, goods which are in reality mortgaged, or when he declares mortgages less than those that really exist. It is purely a civil wrong—*Dictionnaire juridique*. "Le Droit usuel," par Charton-Demeur, p. 505.

[4] *Código de Comercio de 1829*, Art. 1171, 1172.

[5] *Ibid.*, Art. 1170.

they have performed its conditions, while from all others a payment in full of their debts is required.[1]

By the Italian Code,[2] the bankrupt who proves that he has paid in full, principal, interest, and costs, all the claims admitted in the bankruptcy, may obtain from the tribunal the erasure of his name from the list of bankrupts. The effect of this proceeding is the restoration of the debtor to his former rights. This does not apply to fraudulent bankrupts nor to those condemned for certain crimes. The strictness of this rule is tempered, however, by the further provision that the sentence of homologation may decide that after the complete performance of the conditions of the composition, the name of the bankrupt shall be erased from the above mentioned list.[3]

By the Code of the Netherlands, the court on granting the homologation of a composition, is competent, on the proposal of the judge-commissary, and after hearing the public prosecutor, to rehabilitate at once the unfortunate bankrupt who has acted in good faith.[4] In all other cases, the debtor must join to his petition a certificate showing that all his creditors have been paid to their satisfaction.[5] Rehabilitation is refused entirely to those who have been declared guilty of fraudulent sales, or who have been convicted of fraudulent bankruptcy, subtraction, extortion, imposture, or embezzlement of something entrusted to them, or on account of any of the offenses mentioned in Articles 342, 343 and 346 of the Penal Code.[6]

This question is not determined by the Law of Bankruptcy for the German Empire and we are obliged to consult certain other Imperial laws. Those persons who in consequence of a

[1] *Código de Comercio de 1885*, Art. 921.

[2] *Codice di Commercio*, Art. 816.

[3] *Ibid.*, § 839.

[4] *Wetboek van Koophandel*, § 850.

[5] *Ibid*, § 894.

[6] Law of April 26th, 1884, Art. 3, amending Article 893 of the *Code of Commerce*. See *Les Codes Nèerlandais*. Tripel's French Translation, p. 446.

judicial decision have been deprived of the free disposition of their property are subjected to certain incapacities. They are excluded from entrance into a guild, (*Innung*,) or, being already members, may, by a resolution of the guild, be deprived of the exercise of the right to vote, as well as of honors (*Ehrenrechte*) within the guild.[1] They are ineligible to the office of lay assessor or *Schöffe*,[2] juror, or judge of a commercial court.[3] They cannot be admitted as attorneys (*Rechtsanwälte*); if they are already admitted, they may be removed; and if they are members of a Chamber of Attorneys (*Anwaltskammer*)[4], they are ineligible to the office of director.[5]

As these disqualifications are occasioned by the loss on the part of the debtor of the free disposition of his property, it is to be inferred that they will cease when this power is restored to him, or, in other words, that the closing of bankruptcy will be equivalent to a rehabilitation as regards these special incapacities.[6]

Furthermore, the electoral law declares that persons over whose property bankruptcy has been judicially opened, shall, during the proceedings, be deprived of their right to vote for members of the *Reichstag*, and be ineligible for a seat in that body.[7] Here again the closing of the bankruptcy and rehabilitation coincide.

The treatment of a fraudulent bankrupt is quite different. According to the Bankrupt Law,[8] he is punished with penal

[1] *Reichsgewerbeordnung*, §§ 83 (2), 86.

[2] A member of a criminal court of first instance.

[3] *Gerichtsverfassungsgesetz*, §§ 32 (3), 85, 113.

[4] All the attorneys within the jurisdiction of a superior civil court (*Oberlandesgericht*) form an *Anwaltskammer*.

[5] *Rechtsanwaltsordnung*, §§ 5 (3), 22, 43 (1).

[6] *Konkursordnung*, § 192.

[7] Wahlgesetz für den Reichstag des Norddeutschen Bundes, vom 31 Mai, 1869. *Bundes-Gesetzblatt des Norddeutschen Bundes*, 1869, No. 297.

[8] *Konkursordnung*, § 209.

servitude (*Zuchthaus*). The Penal Code provides that to the punishment of penal servitude may be added the forfeiture of civil privileges (*bürgerliche Ehrenrechte*), and that the duration of the forfeiture shall be not less than two years and not more than ten years.[1]

It is therefore evident that fraudulent bankrupts are not restored to their former civic rights by the mere closing of bankruptcy.

It must be borne in mind, furthermore, that the rules contained in these Federal laws will not of necessity prevail throughout the Empire, since the several states have a sphere of legislative autonomy which embraces the matter of disabilities and forfeitures. In Prussia, it is true, the law putting in force within the kingdom the Imperial Bankrupt Law is in accord. It declares that the restrictions which bankruptcy, according to the laws, imposes upon the debtor in the exercise of rights not relating to his property, shall cease with the end of the procedure.[2] In Alsace and Lorraine, on the other hand, the provincial committee (*Landes-Ausschuss*) refused to adopt this principle of the law and maintained the French idea with

[1] *Strafgesetzbuch für das Deutsche Reich*, §32.

The sentence of withdrawal of civil privileges involves the permanent forfeiture of the rights derived by the person condemned from public election, and in like manner the permanent loss of public offices, dignities, titles, orders, and insignia of honor. It further involves during the period appointed in the sentence, incapacity:

1st. To wear the national cockade.

2d. To enter the German army or the Imperial navy.

3d. To acquire public offices, dignities, titles, orders and insignia of honor.

4th. To vote on public affairs, to elect or be elected, or exercise other political rights.

5th. To act as witnesses in connection with the drawing of documents.

6th. To act as guardian, associate guardian, curator, counsel at law, or member of a family council, except when relatives in the descending line are concerned, and the superior official guardian (*i. e.*, the court), or the family council, gives consent.—*Ibid*, §§ 33, 34.

[2] *Gesetze und Verordnungen für den preussischen Staat unddas deutsche Reich.* Ausführungsgesetz zur deutschen Konkursordnung, vom 6 März, 1879.

some modifications. The opening of the procedure occasions for the debtor the forfeiture of civil and political rights as provided by the existing laws, and he shall be relieved of these incapacities by the tribunal only upon the three following grounds:

1st. A payment in full of his debts.

2nd. A declaration of *excusabilité*.

3rd. Conduct exempt from reproach continued during five years.[1]

In Austria, the law upon bankruptcy merely refers to the civil, political, and penal laws as regards these incapacities and their duration.[2] We find that persons who have been declared bankrupt are excluded, while the proceedings continue, from the right to vote and from eligibilty for office, in the election of members of the House of Representatives of the *Reichsrath* as well as of electors, and of members of the *Landtag*,[3] and that the mandate of members of these bodies expires when they lose their eligibilty.[4] They also lose their eligibility as representatives from the various local subdivisions. (*Gemeinde-Bezirks-Gau-und Kreis-Vertretung*).[5] Bankrupts are also ineligible to membership in a Chamber of Commerce, or being members are suspended during the procedure.[6] They lose their right to vote in an industrial association and their eligibility to membership in the same.[7] They may not become

[1] *Gesetz für Elsass-Lothringen betreffend die Ausführung des Civilprozessordnung, der Konkursordnung, und der Strafprozessordnung, vom 8 Juli, 1879*, Art. 31.

[2] *Concursordnung*, §§ 25, 57.

[3] Gesetz vom 2 April, 1874, Nr. 41, *Reichsgesetzblatt*, § 20, Z. 3.

[4] Gesetz vom 2 April, 1873, Nr. 40, *Reichsgesetzblatt; Landesordnungen vom 26 Feb., 1861*, § 6.

[5] Gesetz vom 5 März, 1862, Nr. 18, *Reichsgesetzblatt*, Art. X, c, XXV.

[6] Gesetz vom 29 Juni, 1868, Nr. 85, *Reichsgesetzblatt*, §§ 7, 11.

[7] Gewerbeordnung vom 15 März, Nr. 39, *Reichsgesetzblatt*, §§ 5, 118 b, 120.

officers of a court or notaries.[1] If they are notaries or hold certain public offices, they are suspended from office.[2] They are incapable of being jurors until the close of the proceeding or, in the case of traders, until a judicial rehabilitation.[3] They may not enter a public exchange (*Börse*) during the procedure, and if they have been sentenced for a fraudulent bankruptcy, not till three years after the completion of their punishment,[4] and if they are brokers they will be removed from office.[5]

In all the foregoing cases the disabilities terminate with the bankruptcy procedure, *i. e.* the closing of bankruptcy operates as a rehabilitation.

The effect of bankruptcy upon the civil rights of the debtor will be found in the Austrian Civil Code, §§ 1024, 1210, 1226, 1260, 1261, and 1262.

When speaking of the different kinds of insolvency (Chapter 1, Section 5) we referred to the punishment meted out to debtors who have rendered themselves amenable to the criminal law. It is further provided in the Penal Code that persons who have been convicted of a felony (*Verbrechen*), and sentenced to either of the two grades of punishment (*Kerker oder schwerer Kerker*) shall suffer certain forfeitures and disabilities.[6]

[1] Patent vom 3 Mai, 1883, Nr. 81, *Reichsgesetzblatt*, §4; Gesetz vom 25 Juli, 1871, No. 75, *Reichsgesetsblatt*, § 6 a.

[2] Kaiserliche Verordnung vom 10 März, 1860, Nr. 64, *Reichsgesetzblatt*, § 9; Gesetz vom 25 Juli, 1871, No. 75, *Reichsgesetzblatt*, §§ 9, 26.

[3] Gesetz vom 23 Mai, 1873, Nr. 121, *Reichsgesetzblatt*, § 2.

[4] Gesetz vom 1 April, 1875, Nr. 67, *Reichsgesetzblatt*, § 5.

[5] Gesetz vom 4 April, 1875, Nr. 68, *Reichsgesetzblatt*, § 1, Art. 84c.

[6] Conviction of a felony has the following consequences:

1st. The taking away of all domestic and foreign orders, civil and military badges.

2d. The loss of all public titles, academical degrees and dignities, and the withdrawal of the right to acquire them again without the permission of the Emperor.

3d. The exclusion from the responsible editorship of periodicals.

4th. The loss of every public office or service, including that of teacher, and the

Here again, as in Germany, the principle that the closing of bankruptcy is equivalent to a rehabilitation is not applicable to debtors who have infringed the criminal law.

One more exception must be noticed. At this point, there reappears the difference made by the Austrian law between traders and non-traders. Upon bankrupt *traders* are inflicted three special incapacities that can only be removed by a rehabilitation (*Wiederbefähigung*) to be obtained upon conditions quite similar to those of the French law. To be more explicit, it is provided[1] that after the bankruptcy is closed, and so long as a rehabilitation has not been obtained, a trader remains deprived of the following rights:

1st. The right to carry on commercial business under a firm name, not consisting merely of his own full name.

2nd. Eligibility to membership in a Chamber of Commerce and to other commercial offices of honor.

3d. Capability to hold the office of factor, stock-broker, or administrator in bankruptcy.

By the law of May 23rd, 1873,[2] the bankrupt-trader is also disqualified for jury duty.

lack of capacity to acquire them again without the express permission of the Emperor.

5th. In the case of clergymen, the suspension from their benefices, and the lack of capacity to acquire them again without the express permission of the Emperor.

6th. The loss of competency for the office of judge, advocate and notary, of public agencies, and the right to represent parties before the public authorities (*öffentliche Behörden*).

7th. The loss of all [public] pensions, provisions, or gratuities.

A sentence to *schwerer Kerker* entails the following consequences:

1st. If the felon is of noble birth there must be added to the sentence the loss of his nobility. But this loss affects himself alone, and consequently not his wife nor his children born before the sentence.

2d. As long as the term of punishment continues, the felon can neither conclude transactions *inter vivos* that will bind himself, nor make a last will. His previous acts, however, do not lose their validity on account of the punishment.

[1] *Concursordnung*, § 246.

[2] Nr. 121, *Reichsgesetzblatt*, § 2, Z. 2.

Following the strict French rule, the rehabilitation is granted to the debtor only upon proof of full discharge of all the claims against him, by either payment, release, or any other mode of discharge recognized by the civil law.[1]

Finally, in England, the disqualifications resulting from bankruptcy are of a political character, and have already been enumerated in the chapter on the effects of bankruptcy. (Chapter 2, Section 1.) They are removed if the adjudication against him is annulled, or if he obtains from the court an order of discharge with a certificate to the effect that his bankruptcy was caused solely by misfortune.[2] The court is empowered to decree the annulment as mentioned above, on the application of any interested party, where in its opinion a debtor ought not to have been adjudged bankrupt, or when it is proved to its satisfaction that he has paid his debts in full.[3]

[1] *Concursordnung*, § 247.

[2] *Statutes 46 and 47 Victoria*, c. 52, § 32.

[3] *Ibid.*, § 35.

CHAPTER VI. PREVENTIVE COMPOSITIONS OR COMPOSITIONS BEFORE BANKRUPTCY.

§ 1. *Introductory.* Thus far, we have been speaking only of the regular series of operations in the bankruptcy procedure, and of the means by which this may be suspended or entirely arrested. It now remains to treat of an arrangement by which this procedure may be avoided, and the relations between an unfortunate debtor and his creditors satisfactorily adjusted without subjecting him to the humiliation and ignominy of being adjudged a bankrupt.

This result may be achieved by means of a composition *before* bankruptcy, or what in French law is called *un concordat préventif.* The countries that have adopted it, or something similar, are Geneva in Switzerland, Belgium, England and France. The laws on this subject are of recent date and mark an important stage in the gradual breaking down, by more enlightened sentiments of humanity, of the severity of the ancient bankrupt systems, which was deemed necessary to preserve a high standard of commercial morality. They are intended for the benefit of those debtors who are the victims of misfortune rather than of their own reckless or fraudulent conduct. The composition before bankruptcy differs from the "suspension of payments" already mentioned, in that the debtor applying for its benefits is not obliged to prove his solvency.

These Genevese laws of July 7th, 1877, and December 2nd, 1880—which will shortly be replaced by a Federal law upon bankruptcy for all Switzerland, containing an institution of the same nature—established the precedent for the Belgian law of June 30th, 1883, organizing the *concordat préventif.* Tracing the development still farther back, it will be found that in their

general arrangement the French decrees of 1848 and 1870, which established temporarily what were called "amicable compositions" (*concordats amiables*), bear a resemblance to the more recent law of Belgium. Again, if we disregard details and view the subject broadly, we shall find many points of similarity between the Belgian *concordat préventif*, and the provisions in the English Bankruptcy Act of 1883, for a "composition or scheme of arrangement" which may follow the "receiving order" and prevent an adjudication of bankruptcy.

This modern feeling that the condition of the worthy but unfortunate debtor should be ameliorated has finally penetrated the hearts of the French legislators, and has received its most recent expression in the law of March 4th, 1889, ordaining what is known as "judicial liquidation" (*liquidation judiciaire.*)

§ 2. *Geneva.* The Genevese law of 1880 above mentioned,[1] declares that any trader who is prevented from meeting his engagements may, in order to avoid the declaration of bankruptcy, demand from the Tribunal of Commerce a respite (*sursis*) in order that he may propose to his creditors the terms of a composition. Accompanying his demand there must be deposited at the office of the clerk of the court a balance-sheet setting forth the names of the individual creditors, their residences, and the sums due them, his regular daily accounts, and a petition addressed to the Tribunal signed by the demandant and approved in writing by the majority in number and value of his creditors, not including privileged creditors and those secured by mortgage.[2] After examining these papers and receiving the opinion of the *ministère public* (see page 20, Chap. I, Sect. 5), the Tribunal either grants or refuses the demand for the respite. If it is to be granted, the Tribunal delegates one of its members to exercise a supervision over the

[1] Loi du 2 décembre, 1880, sur les sursis concordataires; *Annuaire de Législation Étrangère*, 1881, p. 469.

[2] Art. 2, *Créanciers chirographaires* are distinguished from *créanciers privilégiés et hypothécaires.*

operations, and appoints a commissioner (*commissaire au sursis*). Dating from this judgment, which must be properly advertised, all suits and executions against the debtor, with some exceptions, are suspended.[1] During the period from the judgment pronouncing the respite to the confirmation of the composition, the debtor may make no transfer of property, nor perform any act that will affect the condition of his estate, without express authorization from the commissioner. In case the debtor violates these provisions, the commissioner will report the fact to the Tribunal, and it may, of its own motion, declare the bankruptcy, after the debtor has been heard or duly summoned.[2]

The commissioner forthwith proceeds to make an inventory of the assets, and takes the necessary measures to protect the interests of the creditors and to continue the business of the debtor if it seems expedient.[3] The liquidation of the assets may be commenced only after the meeting of the creditors, with the consent of the judge-delegate (*juge-délégué*) and the debtor. The law regulates in detail the procedure to be followed in the verification of claims. The formation of the composition requires the consent of a majority in number of admitted creditors, representing three-fourths of the total value of the claims admitted absolutely or provisionally, and under pain of nullity must be signed by the debtor and creditors at the same meeting.[4] If in the vote upon the composition only one of the necessary majorities is obtained, the matter must be postponed until a second meeting, to be held within a period not exceeding fifteen days. If neither of the majorities is obtained at the first meeting, or but one at the second meeting, the bankruptcy must be declared by a judgment of the Tribunal of Commerce fixing the cessation of payments at the date of the judgment

[1] *Ibid.*, Art. 3.

[2] *Ibid.*, Art. 4.

[3] *Ibid.*, Art. 5.

[4] *Ibid.*, Art. 17.

granting the respite. The right is reserved to the court, however, to make bankruptcy relate back to an earlier date.[1] Although the composition has been voted by both the requisite majorities, it will not be operative until it has been confirmed by the Tribunal, and, if this is refused, after hearing the objections of the parties interested, bankruptcy will be declared.[2] When duly confirmed it binds, without exception, all interested parties.[3]

The cancellation of the composition after confirmation may be obtained from the court or pronounced of its own motion in certain specified cases, namely, when there has been any deceit or fraud on the part of the debtor, or if it is proved that he has fraudulently altered the true condition of his affairs, or made any transfer of his property, or perfomed any act affecting his estate, during the period between the judgment declaring the respite (*sursis*) and the confirmation of the composition, or if he has not fulfilled the engagements entered into by him according to the terms of his composition deed.[4] The cancellation for deceit or fraud discharges the sureties who have guaranteed the total or partial execution of the composition unless they are implicated in the deceit or fraud, but cancellation for any other cause will not free them.[5] As soon as the composition has been confirmed, the functions of the commissioner and judge-delegate cease. The expenses and disbursements of the operations of the respite or *sursis concordataire*, including the emoluments of the commissioner, are privileged claims against the estate.[6]

§ 3. *Belgium.* The law in Belgium[7] has not repealed the

[1] *Ibid.*, Art. 18, 20.

[2] *Ibid.*, Art. 21–24.

[3] *Ibid.*, Art. 25.

[4] *Ibid.*, Art. 26.

[5] *Ibid.*, Art. 27, 28.

[6] *Ibid*, Art. 29, 30.

[7] Loi du 20 juin, 1883; *Annuaire de Législation Étrangère, 1884*, p. 510.

provisions of the law of 1851 in regard to the ordinary composition. It has only introduced an additional form of composition which may be obtained under other conditions. By the law of 1851, as in France, the composition was admitted only after bankruptcy had been declared. In practice it could be formed only after several months had elapsed, and at a time when the debtor's business had been disorganized.

An attempt was made by the law of 1851, it is true, in the interest of the unfortunate and innocent debtor, as well as of his creditors, to dispense in certain cases with this slow and burdensome procedure. By Article 520, it was ordained that under certain circumstances therein enumerated, the debtor upon making his confession of insolvency might petition that a meeting of his creditors be immediately convened to consider his propositions for a composition. To guard against any dangers that might result from such hasty proceedings, the composition could be voted only by a majority of three-fourths in number of the creditors, representing five-sixths of the claims, whereas the ordinary composition in Belgium as in France required only a simple majority in number of the creditors representing three-fourths of the claims. The declaration of bankruptcy, the verification and admission of claims, were all to be made at this one meeting.

The disuse into which this article fell, seemed to indicate that its application was either undesirable or impossible. Two causes have been assigned. In the first place, the composition could be formed only after the debtor had been adjudged bankrupt. It was necessary, therefore, before the debtor could bring himself within the purview of the article, that he should have ceased his payments, and made the required confession to the clerk of the tribunal. These facts would of course involve the surrender by the debtor of his books of account and the control over his property. Under these circumstances, there was little advantage to be gained by invoking this article. In the second place, it was found impossible to carry on the operations with the rapidity demanded by this law.

The present law allows the debtor to obtain his composition prior to the declaration of bankruptcy, and thus escape it entirely with its concomitant annoyance, while on the other hand, he is not subjected to those conditions which rendered the older arrangement impossible.

Monsieur Lyon-Caen, professor in the Paris Faculty of Law and in the School of Political Science, tells us that the framers of this law had three principal objects in view.

"In the first place," he says, "they wished to protect the unfortunate and innocent debtor by affording him a means of escape from bankruptcy with the harsh consequences which it involved. In theory, it might undoubtedly be said that a debtor is always at liberty to treat with his creditors, even in the absence of any declaration of bankruptcy. But, in practice, such arrangements are almost impossible, because for their formation the consent of all the creditors is necessary, and there are always recalcitrant creditors, who either refuse their consent from malice, or demand in return for it advantages prejudicial to others. The second purpose of the law is to protect the creditors against the exorbitant or even dishonest claims of others of their number. Liquidation according to the provisions established by law, on account of the expense and delay incident thereto, is sometimes ruinous to the creditors. It is often as desirable for them as for the debtor that there should be an arrangement by which the latter might himself liquidate his estate under agreed conditions. Finally, the third object of the law is to encourage the debtor who is on the verge of bankruptcy not to wait as long as he frequently does before making known his true situation, and to endeavor to come to an arrangement with his creditors. The debtor who apprehends bankruptcy, in order to escape it contracts ruinous loans or engages in speculation; then he calls his creditors together and seeks to conclude an arrangement which is nearly always impeded by some of them; to keep off the most exacting he pays them to the prejudice of the estate, and the most accommodating are not paid. The actions brought against the debtor burden him with enormous expenses and annihilate his credit. In spite of all, he does not escape bankruptcy, and numerous law-suits are then

necessary to establish equality among the creditors in recovering the sums paid to the injury of the estate. It is hoped that when the debtor knows that there exist some protective measures, he will not wait so long, and resort to these manœuvres, and that he will address himself as soon as possible to his creditors, and endeavor to obtain under the supervision of the court a composition that will forestall bankruptcy."

This law has not repealed the provisions in the law of 1851 for "suspension of payment."[1] The two arrangements, however, are not in all respects similar. The debtor who applies for the benefit of a "suspension of payment" must establish to the satisfaction of the court that, although temporarily embarrassed, his assets are sufficient to eventually discharge his liabilities. This is not necessary in the preventive composition. There is another marked difference in their application. The latter, like bankruptcy, applies only to traders.[2] Suspension of payment, on the contrary, may be granted not only to traders, but also to proprietors of industrial establishments, who are not regarded by the law as traders.[3]

The following is a brief summary of the more important provisions of the Belgian law upon preventive compositions.[4]

A commercial debtor may escape the declaration of bankruptcy, if he obtains from his creditors a composition of this kind in the forms and under the conditions prescribed by this law. (Art. 1.) It may be established only with the consent of a majority in number of the creditors, representing three-fourths of the total amount of the claims not contested or admitted provisionally, and before it goes into effect, it must have the confirmation of the Tribunal of Commerce. This will only be granted in favor of the unfortunate debtor who has acted in good faith.

[1] *Loi du 18 avril, 1851*, Art. 599 ff.

[2] *Loi du 20 juin, 1883*, Art. 1.

[3] *Loi du 18 avril, 1851*, Art. 614.

[4] *Loi du 20 juin, 1883.*

The debtor addresses a petition to the Tribunal of Commerce of his domicile. He joins to this

1st. An account of the events upon which he bases his petition.

2nd. A detailed estimate of his assets.

3rd. A list of his creditors with their residences and the amount of their claims.

4th. His propositions for a composition. (Art. 3.)

The Tribunal, if it decides to entertain the petition, appoints a time, within the fortnight following, for a meeting of the creditors and delegates one of its members to examine into the situation of the debtor, preside at the meeting of the creditors, and exercise a general supervision over the operations of the composition.

While the negotiations are pending the debtor is exempt from suits and executions on the part of the creditors. (Art. 5.) During this period, however, he may neither alienate nor mortgage his property, nor enter into any engagements without the authorization of the judge-delegate. (Art. 6). The judge-delegate appoints, if there is reason for so doing, one or more experts who, after taking oath, proceed to verify the condition of the debtor's affairs. Their fees, which are determined by the Tribunal, become privileged claims. (Art. 7.) The debtor must deposit with the clerk of the court the sum necessary to cover the expenses of the meetings and advertising. (Art. 8.) When the assembly of creditors meets, the judge-delegate renders his report, and the debtor formulates his propositions. The creditors, having presented their claims, proceed to vote upon the composition. (Art. 9.) At any time during these proceedings, the Tribunal may declare the bankruptcy, if it becomes convinced that the debtor is not innocent and the victim of misfortune. The judgment of confirmation when once rendered is annulled if the Tribunal decides that the debtor has been guilty of bad faith.

The composition is obligatory upon all the creditors, but af-

fects only engagements entered into prior to its formation. Its cancellation may be demanded by the sureties or any of the creditors affected by it, either upon the debtor's conviction for simple or fraudulent bankruptcy occuring after the confirmation, or on account of fraud (*dol*) discovered since that time, as for example the concealment of assets or exaggeration of liabilities.

One of the chief merits pointed out by the friends of this measure is the fact that the debtor does not undergo a dispossession (*dessaisissement*) of his goods. In ordinary bankruptcy both creditors and debtor usually suffer from the transfer of the management of the estate to a syndic. Apart from the remuneration which he must receive for his services, the estate is often damaged by his inefficiency and mismanagement, since he may perhaps be a man with but little experience in the control of a large business. The person best qualified, it is thought, to conduct the liquidation of the estate so that it will yield to the creditors the largest possible dividends, is the debtor himself. But the advantages derived from the arrangement are to a large degree neutralized by the very broad and vaguely defined supervision placed over the debtor by the law. It is exercised by a functionary appointed by the Tribunal. In Geneva it is a commissioner; in Belgium, a judge-delegate selected from among the judges constituting the Tribunal. The law draws no sharp line of demarcation between the acts which the debtor may perform alone, and those for which the authorization of the commissioner or judge-delegate is required. The determination of the boundaries of these two classes of acts is left to judicial interpretation. If article 6 of the Belgian law, "Le débiteur ne pourra, pendant la procédure suivie pour l'obtention du concordat, aliéner, hypothéquer ou s'engager, sans l'autorisation du juge-délégué" should be construed by a court unfavorably disposed to a debtor he would apparently be deprived of all freedom of action. How to realize one of the main purposes of this law, namely

to retain the debtor, in the management of his business, and at the same time impose upon him such restraints as the interests of his creditors, may demand, will form an appropriate subject for future legislation.

§ 4. *England.* The English law has also proceeded upon the principle that it is just and expedient that an honest and unfortunate debtor should escape the disgrace of a bankruptcy. It is provided[1] that "the creditors may at the first meeting, or any adjournment thereof, by special resolution, resolve to entertain a proposal for a composition in satisfaction of the debts due to them from the debtor, or a proposal for a scheme of arrangement of the debtor's affairs." This meeting is convoked as soon as possible after the "receiving order," and is presided over by the "official receiver". Two meetings are necessary for the vote on the composition or arrangement. At the first, the propositions of the debtor are received, and at the latter, which is held after the public examination has occurred, the vote is taken. In both meetings a simple majority in number representing three-fourths of the value of the claims is necessary. In the former meeting the majority in sum is calculated upon the number of creditors present in person or duly represented, whereas in the latter it is based upon the amount of verified claims. But these compositions may only be formed after the debtor's affairs have been investigated, and the cause of his cessation of payments ascertained by the court at a public examination. In the interests of the dissenting minority the law demands that the composition must be confirmed by the court before it shall become effective, and enumerates certain cases where the judge must refuse the confirmation (§ 18 [6]). Thus if the court is of opinion that the terms of the composition are unreasonable, or are not calculated to benefit the general body of creditors, or in any case in which the court is required where the debtor is adjudged bankrupt to refuse him a discharge, the court *shall*, or if any such facts are proved as would

[1] *Statutes 46 and 47 Victoria*, c. 52, § 18.

justify the court in refusing, qualifying, or suspending the debtor's discharge, the court *may*, in its discretion, refuse to approve the composition or scheme.

It is this intervention of the court that differentiates the composition as regulated by the law of 1883 from that contained in the law of 1869.[1] The point of view of the legislature in 1869 was that insolvency was a matter of private interest solely, consequently any control of a public authority was to be only tolerated and reduced to a minimum. It was the reign of "voluntarism" as opposed to the "officialism" of the French and kindred legislations, where insolvency is viewed rather as a matter of public concern, and the proceedings from beginning to end placed under the control of the judicial authority.

By the law of 1869, a composition before bankruptcy might be concluded by a debtor with a majority of his creditors, which would be obligatory upon all. The negotiations were free from all judicial control. Not even was the confirmation of the court required. It was the creditors themselves who were to investigate the conduct of the debtor and the cause of his insolvency. Provision was made for the registration of the composition, it is true; but the duty of the clerk of the court was merely to notice whether the necessary formalities had been complied with. Although, by this arrangement, the creditors often received but a small part of their claims, nevertheless, it was generally preferred, on account of the expense and slowness of ordinary bankruptcy. Statistics show that from 1870 to 1877 these arrangements and compositions formed five-sixths of the total number of cessations of payment.[2]

[1] *Statutes 32 and 33 Victoria*, c. 71, §§ 125–127.

[2] See *Bulletin de la Société de Législation Comparée*, 1888, p. 301; "Exposé de la Législation anglaise sur la faillité," par M. Lyon-Caen.

Declarations of Bankruptcy	8275,
Liquidations by Arrangement	31651,
Compositions before Bankruptcy	20270,
Total	60196.

Furthermore, compositions and arrangements were steadily increasing, while declarations of bankruptcy were decreasing.

The frauds which this system left undiscovered and unpunished, and the meagre dividends yielded by the debtor's estates, were among the causes that induced the legislation of 1883. It is somewhat curious to notice that while the current upon the Continent is setting strongly and steadily in the direction of a more humane and considerate treatment of the debtor, the latest English law is more severe than its predecessor, although still much milder than the French system.

§ 5. *France.* There now remains to be considered, what modifications were introduced into the French law by the act of March 4th, 1889,[1] establishing what is known as "judicial liquidation," a proceeding which, like those we have been discussing, is intended to be a substitute for bankruptcy in certain cases. Its provisions may be summarized as follows: Every trader who stops payment may obtain the benefit of a judicial liquidation by conforming to this law (Art. 1). The debtor must present his petition accompanied by a balance-sheet and a list containing the names and residences of his creditors, to the Tribunal of Commerce of his domicile within a fortnight from his cessation of payment (Art. 2.) This petition is passed upon by the Tribunal after the debtor has been afforded an opportunity to be heard. If it is granted, the judgment so decreeing appoints one of the members of the court judge-commissary, (*juge-commissaire,*) and also one or more temporary liquidators. These latter at once attach the debtor's books and proceed with him to the preparation of an inven-

[1] *Bulletin des lois,* 1889.

tory. This judgment is not susceptible of appeal, and cannot be attacked by third parties (Art. 4).

After judicial liquidation has been opened, actions must be brought, and executions levied, against both the liquidators and the debtor. On the other hand, the debtor may contract no new debts, nor alienate all or a portion of his assets, except in certain enumerated cases (Art. 5). With the assistance of the liquidators, the debtor may proceed to the recovery of all debts due, take all precautionary measures, sell objects likely to perish or subject to immediate depreciation or expensive to keep, and bring all necessary actions. If the debtor refuses, the liquidators must act alone, with the authorization of the judge-commissary. In the case of actions to be brought, however, this authorization need not be obtained, but the liquidators must make the debtor a party. The debtor may, also, with the assistance of the liquidators and the authorization of the judge-commissary, continue his business. The proceeds arising from the recoveries and sales are remitted to the liquidators, who deposit them in the *Caisse des depôts et consignations* (Art. 6). The debtor may, with the advice of the controllers, (*contrôleurs*), the assistance of the liquidators, and the authorization of the judge-commissary, compromise any suit whose value does not exceed a certain sum, (500 francs). If the value is indeterminate or exceeds this sum the compromise is obligatory only after it has been approved by the court according to article 487 of the Code of Commerce (Art. 7). The judgment declaring judicial liquidation opened renders due, as regards the debtor, the debts which have not yet arrived at maturity. It arrests as against the estate only the running of interest on every debt not guaranteed by privilege or other security. In the latter class of debts, interest may be claimed only from the proceeds arising from the sale of the goods affected with the privilege or security (Art. 8).

Soon after this judgment, a meeting of the creditors is called, at which the debtor presents a statement of the situation of his

affairs. The creditors express their opinion as to the appointment of final liquidators, and are also consulted upon the expediency of choosing immediately from among their number one or two "controllers" (Art. 9.). The controllers are charged with the duty of verifying the books and the statement of his affairs presented by the debtor, and to supervise the operations of the liquidators, from whom they may demand at any time an account of the state of the liquidation. The liquidators are obliged to take their advice on actions to be brought. The services of the controllers are rendered gratuitously, and they may be removed only by the Tribunal of Commerce with the advice of a majority of the creditors, and on motion of the judge-commissary. (Art. 10.)

Provision is made for the verification of claims very similar to those contained in the Code of Commerce for an ordinary bankruptcy. (Art. 11, 12, 13.)

After the termination of this proceeding, the creditors are convened to take under consideration the debtor's propositions for a composition, which requires for its validity the consent of a majority of the creditors whose claims have been verified or provisionally admitted, representing two-thirds of the total amount of such claims, and a confirmation by the court. If this is granted, the court declares the liquidation ended. Where by the terms of the composition assets have been surrendered, which have to be collected and distributed, the creditors are consulted as to the continuance in office of the liquidators and controllers, or their removal and the appointment of new ones. The proceedings for the collection and distribution of the assets follow the provisions of the Code of Commerce in reference to compositions by relinquishment of assets. (Art. 15.)

A trader who is enjoying the benefits of a judicial liquidation may be declared a bankrupt at any time by the Tribunal of Commerce, either of its own motion, or upon demand of the creditors,

1st. If it is discovered that the petition for judicial liquidation was not presented within fifteen days from the cessation of payments, as required.

2d. If the debtor obtains no composition. In this case, if bankruptcy is not declared, judicial liquidation will continue up to the liquidation and distribution of the assets.

The Tribunal may likewise declare bankruptcy at any period of the judicial liquidation,

1st. If since the cessation of payment or within ten days preceding, the debtor has consented to one of the acts forbidden by the Code of Commerce in Articles 446, 447, 448 and 449.[1]

2d. If he has concealed his assets exaggerated his liabilities, or omitted the names of any of his creditors.

3d. If the composition has been cancelled.

4th. If the debtor has been convicted of simple or fraudulent bankruptcy. (Art. 19.)

It will be noticed that the French legislature has attempted to define more clearly than the Belgian the respective spheres of action of the debtor on the one hand, and the officials placed in control over him on the other. Another noteworthy innovation is the granting to the creditors a greater influence over bankruptcy proceedings, which have heretofore in France been almost entirely under the direction of the Tribunal. This has been effected by the introduction of controllers (*contrôleurs*) selected from among the creditors and answering in a general way to the committee of the creditors in some of the other countries that we have considered. The institution of *contrôleurs* is not confined to the case of judicial liquidation, but the provisions of this law in regard to them have been made applicable to ordinary bankruptcy. (Art. 20.)

In neither Germany, Austria, nor Hungary has there been organized any procedure of this kind to enable a debtor to

[1] See Part I, Chapter 2, § 3, of this monograph.

avoid the humiliation of bankruptcy; while in Germany the law of 1877[1] has even abolished the suspension of payment that might have been granted formerly by the sovereign and still more recently by the court.

[1] *Konkursordnung*, § 4.

PART II.—UNITED STATES.

CHAPTER I. THE NATIONAL BANKRUPT LAW.

§ 1. *The Power of Congress to Pass such a Law.* The Constitution of the United States gives to Congress the power "to establish uniform laws on the subject of bankruptcies throughout the United States."[1] "A single statute of bankruptcy for the whole United States can of course be enacted only by the legislature of the general government, and uniformity could hardly be attained in any other way. The establishment of '*uniform laws*' upon the subject is, therefore, practically an exclusive power of the Congress."[2] In the absence of a national law, however, the legislatures of the several States of the Union have at various times passed such statutes to operate within their own jurisdictions, and their conduct has been sustained as constitutional by the United States Supreme Court.[3] In the case of Sturges *versus* Crowninshield, Chief Justice Marshall said:

"It is not the mere existence of the power, but its exercise, which is incompatible with the exercise of the same power by the States. It is not the right to establish these uniform laws, but the actual establishment, which is inconsistent with the partial acts of the States. It has been said that Congress has exercised this power, and by doing so has extinguished the power of the States, which cannot be revived by repealing the law of Congress. We do not think so. If the right of the States to pass a bankrupt law is not taken away by

[1] Article I, Sec. 8, § 4.

[2] Burgess, *Political Science and Comparative Constitutional Law*, volume II., page 146.

[3] Sturges *vs.* Crowninshield, United States Reports, 4 Wheaton, 122.

the mere grant of that power to Congress, it cannot be extinguished, it can only be suspended, by the enactment of a general bankrupt law. The repeal of that law cannot, it is true, confer that power upon the States; but it removes a disability to its exercise which was created by the act of Congress."

At the time of the adoption of our Constitution, bankruptcy and insolvency in the English law had quite distinct meanings. They came within the jurisdiction of different courts, and were based upon different principles. Imprisonment for debt existed in England, and the insolvent law was intended to afford a debtor thus confined an opportunity to regain his freedom by asking for a discharge and offering to surrender all his property for distribution among his creditors. Only the person of the debtor was discharged. Bankruptcy, on the other hand, had a more technical meaning; such laws had appeared with the higher development of commerce; they were applicable solely to traders, could be put into operation only by the creditors, and had the effect of discharging the debts as well as the person of the debtor. The two systems did not differ, however, as regards the surrender and administration of the debtor's property.

The strict constructionists in the United States maintained that the word "bankruptcy" as used in the constitutional grant to Congress should be limited in meaning to the narrow English sense; but the courts at an early period decided that this clause was to be construed as giving power to Congress to adjust the affairs of all insolvent debtors. For instance: it may pass a system of voluntary as well as involuntary bankruptcy;[1] it may commit the execution of the system to such Federal courts as it may select, and prescribe such modes of procedure and means of administering the system as it may deem best suited to carry the law into successful operation;[2]

[1] 5 Hill (N. Y.), 317; 8 Illinois, 225.

[2] 3 Bliss (C. C.), 219; 2 Story (C. C.) 648.

it may define what and how much of the debtor's property shall be exempt from the claims of his creditors;[1] it may also pass a law which will have effect to make void an assignment which is valid under the State law.[2] Furthermore, the power is not limited to the regulation of the bankruptcies of any particular class of persons,[3] so long as the law is uniform throughout the United States; but a law prescribing one rule in one district and a different one in another, cannot be regarded as uniform.[4]

The old distinction between bankruptcy and insolvency has, therefore, been broken down in this country. But the State legislatures, perhaps to avoid any possible encroachment upon the field of Congressional action, have always called their enactments "insolvent laws," although many of them partake largely of the nature of bankrupt laws. We may, therefore, say that a law of this kind is a bankrupt or an insolvent law, according as it emanates from Congress or a State legislature. Chief Justice Marshall, in the case of Sturges *versus* Crowninshield,[5] says: "A bankrupt law may contain those regulations which are generally found in insolvent laws, and an insolvent law may contain those which are common to a bankrupt law."

§ 2. *The Exercise of the Power by Congress.* Congress, in pursuance of the power vested in it by the Constitution, has at three different times enacted a National Bankrupt law, namely in 1800, 1841, and 1867. The act of 1867 was amended in 1874 and repealed in 1878. The laws of 1800 and 1841 were passed at the solicitation of debtors, who had suffered during the preceding commercial crises, and they were repealed in 1803 and 1843 respectively when the pressure was removed. The law of 1867 was passed under similar

[1] 11 B. R., 21.

[2] Crabbe (U. S.), 456.

[3] 1 Sandford (N. Y.), 187.

[4] 14 N. H., 509.

[5] United States Reports, 4 Wheaton.

circumstances, but at that time the necessities of a rapidly increasing commerce had awakened the country to the importance of a general bankrupt law. The framer of this law, Mr. J. A. Jenckes, of Rhode Island, attempted to adapt it to the wants of both creditors and debtors; to secure equality by forbidding preferences to favored creditors, and by dissolving all recent attachments upon the debtor's property, and to relieve the situation of honest debtors by giving them discharges on certain conditions. In 1874, this law was amended by Congress in a way that made it very difficult and expensive for creditors to force a debtor into bankruptcy; and at the same time there was borrowed from the English law of 1869 a mode of discharge by composition that was objected to both in England and in this country as giving too much power to the debtor and too little to the courts. As we have seen, the dissatisfaction which this system aroused in England has led to its modification by the law of 1883, in which the theory of "officialism" has replaced that of "voluntarism."

§ 3. *The Provisions of the Law of 1867.* The provisions of this act[1] were briefly as follows: The tribunals having jurisdiction in bankruptcy cases were the United States courts. The debtor might be adjudged bankrupt either upon his own application or upon that of his creditors. The former case was called "voluntary," the latter "involuntary," bankruptcy. The act was applicable, not to traders only, but to any person residing within the jurisdiction of the United States and owing debts provable in bankruptcy exceeding the amount of three hundred dollars. In a case of voluntary bankruptcy, the debtor might apply by petition to the judge of the proper District Court, setting forth his place of residence, his inability to pay all his debts in full, his willingness to surrender all his property for the benefit of his creditors, and his desire to obtain a discharge from his debts. There must accompany the petition a schedule containing a statement of all his debts, of

[1] *United States Revised Statutes*, Title LXI.

the names of his respective creditors, of the consideration of each debt, and of any security given for its payment, and also an inventory of all his property, real and personal. He would then be adjudged bankrupt, and notice would be given to his creditors.

A debtor whose indebtedness exceeded three hundred dollars might be subjected to an involuntary bankruptcy when he committed one of the following "acts of bankruptcy" enumerated in the law: (1) Departing from the State, district, or territory, of which he was an inhabitant, with intent to defraud his creditors; or, when absent, remaining absent with like intent. (2) Concealing himself to avoid the service of legal process for the recovery of a debt payable under the act. (3) Concealing or removing property to avoid its attachment under legal process. (4) Making any assignment, gift, sale, conveyance, or transfer of his estate, property, rights, or credits, with intent to delay, defraud, or hinder his creditors. (5) Being under arrest upon legal process, founded upon a claim in its nature provable against a bankrupt's estate and for a sum exceeding one hundred dollars, for a period of seven days, or being actually imprisoned for more than seven days in a civil action founded upon contract for one hundred dollars or a larger sum. (6) Making any payment, gift, grant, sale, conveyance, or transfer of money or other property, estate, rights, or credits, or confessing judgment or giving warrant to confess judgment while bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, or procuring his property to be taken upon legal process with intent to give a preference to one or more of his creditors or to persons liable to him as sureties or otherwise, or with intent by such disposition of his property to defeat or delay the operation of the act. (7) Being a banker, broker, merchant, trader, manufacturer, or miner, and fraudulently stopping payment or suspending and not resuming payment of his commercial paper within a period of fourteen days.

This petition, which might be presented by a creditor or creditors the total of whose provable debts amounted to at least two hundred dollars, was to be brought within six months after the alleged act of bankruptcy.

The Act of 1867 provided also for restraining transfers of property by the debtor, for convening meetings of the creditors, *etc.* An assignee in bankruptcy was chosen by the majority in number and in value of his creditors who had proved their debts, subject to the approval of the judge. The judge or register in bankruptcy[1] assigned to him all the bankrupt's estate, with all the necessary deeds, books and papers. The assignee was thereupon vested with the title to this property, and any attachment made thereon within four months before the commencement of proceedings was dissolved. Certain articles of domestic use and convenience to the value of five hundred dollars, wearing apparel and such other property as was exempt from attachment by the United States or State laws, were retained by the bankrupt. The assignee might be required to give a bond, and had power to enforce all rights of action belonging to the debtor and to collect all available assets. The assets were to be distributed *pro rata* among the creditors, without any priority or preference except in certain enumerated cases. The following claims were to be first paid in full in the order given: (1) The fees, costs, and expenses of suits and of the proceedings in bankruptcy. (2) All debts taxes, or assessments due to the United States (3). Debts, taxes, and assessments due to the State wherein the proceedings were pending. (4) Wages not exceeding fifty dollars due to any operative, clerk, or house-servant for labor performed within six months before the bankruptcy proceedings. (5) Debts due to any persons who by the laws of the United States were entitled to priority.

As regards the discharge from his debts, the bankrupt

[1] These were officers appointed for the transaction of administrative or non-litigated business in connection with the bankruptcy proceedings.

might make such an application at any time after the expiration of six months from the adjudication, or at any time after sixty days, if no debts had been proved or no assets had been collected. A discharge was refused if the bankrupt had been guilty of any one of a number of fraudulent acts enumerated in the law, or if his assets would not pay fifty per cent. of the proved claims upon which he was liable as principal debtor, unless he could obtain the written assent of a majority in number and in value of his creditors. There was also a provision that a person who had received one discharge and afterwards become a voluntary bankrupt, could not obtain a second discharge unless his assets would pay seventy per cent. of his debts, or unless he obtained the assent of three-quarters in value of his creditors.

§ 4. *The Amendment of 1874.* The amendatory act of June 22nd, 1874,[1] introduced some radical changes. Under the former law a petition could be filed by any creditor whose claim exceeded two hundred and fifty dollars against a debtor who had committed an act of bankruptcy. This was changed so that, to obtain an adjudication, it was requisite that one-fourth in number and one-third in value of the creditors should unite in the petition. Recognizing the difficulty, if not impossibility, of knowing the number of creditors and the amounts of their claims, it was provided that if the debtor denied the allegation that the requisite number had joined in the petition, he must file in court a full list of his creditors with their places of residence and the sums due them respectively, whereupon the court should ascertain upon reasonable notice to the creditors whether one-fourth in number and one-third in amount had petitioned. It was then further provided that

"If it shall appear, [that is, after inquiry and examination into the truth of the statement of creditors filed by the debtor] that

[1] *United States Statutes at Large*, 1873–7, Session I, chap. 390. See also *The Bankrupt Law as it now is*, by A. Blumenstiel.

such number and amount have not so petitioned, the court shall grant reasonable time, not exceeding, in cases heretofore commenced, twenty days, and in cases hereafter commenced, ten days, within which other creditors may join in such petition. And if, at the expiration of such time so limited, the number and amount shall comply with the reqirements of this section, the matter of bankruptcy may proceed; otherwise the proceedings shall be dismissed and, in cases hereafter commenced, with costs."

Many objections were raised to the practical operation of this amendment. It was found difficult to procure creditors to join in the petition, and if more than two-thirds of the creditors were beyond reach by virtue of their residence, it would be impossible to secure an adjudication. In any event, much time would be lost, and in the interim a fraudulent debtor might dispose of all his property or give preferences, and the short interval during which such acts were voidable would have expired. Rather than submit to such trouble and delay, creditors preferred to rely upon the ordinary legal remedies of judgment and attachment, although they might be obliged subsequently to restore such property as a preference. But even this risk was lessened, for by the amendment such an act would not be invalid as a preference unless performed within *two* months (instead of *four* as in the law of 1867) before the filing of a petition against the debtor. And even though a preference had been so obtained by actual fraud, yet the creditor would only be debarred from proving more than one-half his claim, instead of the whole amount as previously. But in case a bankruptcy proceeding had been commenced, the indisposition of the creditors to expend time and money in exercising a proper supervision, exposed the estate to losses by unnecessary litigation, exorbitant fees, *etc.*

In the draft for a National Bankrupt law that has been pending for several sessions in Congress, Mr. Lowell, its author, has attempted to check these abuses. To secure more efficient supervision, he suggests that "a salaried officer like a

Bank or Insurance Commissioner should be appointed in each circuit, whose sole duty it should be to provide the supervision over the speedy and economical settlement of bankrupt estates which the creditors cannot be relied upon to furnish."[1] He would thus follow the lead taken by England in 1883 in substituting "officialism" for "voluntarism," and take a step in the direction of the French system. To prevent waste of assets, he proposes that all officers such as registers in bankruptcy should be paid by salary instead of fees. Such expenditures could be reimbursed to the United States in some definite way, for example, by a fee upon the opening of a bankruptcy proceeding, or by a specific tax upon the assets.

The provision of the 1874 amendment which was regarded at the time as its best feature, was that for a "Composition with Creditors." In nearly every insolvency there will be found some intractable creditors, generally those whose claims are the smallest, who will persistently refuse to compromise, and thus force into bankruptcy an honest and unfortunate debtor, who if allowed to continue his business under some satisfactory arrangement with his creditors, might eventually succeed in discharging his indebtedness. The purpose of this clause was to effect a composition that would be obligatory upon such a refractory minority. It partook of the nature both of a preventive composition and of an ordinary composition after bankruptcy. It provided, that in all cases of bankruptcy now or hereafter pending, whether an adjudication in bankruptcy shall have been had or not, the creditors may at a meeting to be called under the direction of the court, upon not less than ten days' notice to each known creditor of the time, place, and purpose of such meeting, resolve that a composition proposed by the debtor shall be accepted in satisfaction of the debts due to them from the debtor.

To be operative the resolution required the consent of a simple majority in number and three-fourths in value of the

[1] See Lalor's *Cyclopædia of Political Science*, vol. I, p. 223.

creditors present or represented at the meeting, and confirmation by the signatures of the debtor and two-thirds in number and one-half in value of *all* the creditors of the debtor. To make it impossible for small or secured creditors to prevent a composition, creditors whose claims did not exceed fifty dollars and also secured creditors claiming an excess above the value of their security, were to be included in computing the value of all the claims, but excluded in computing the number of creditors. The debtor, unless prevented by some cause satisfactory to the meeting, was to be present and answer any inquiries made of him; and he, or if he were prevented from being present, some one in his behalf, was to produce to the meeting a statement showing the whole of his assets and debts, and the names and addresses of his creditors. The resolution in favor of a composition, together with the statement of the debtor as to his assets and debts, was to be presented to the court, and the court upon notice to all the creditors of the debtor of not less than five days, and upon hearing, was to inquire whether such resolution had been duly passed, and if satisfied that it had been, it was, if satisfied that the same was for the best interests of all concerned, to cause the resolution to be recorded and the statement to be filed; until which time the resolution would be of no validity. Every creditor had the right to inspect the same at all reasonable times.

The creditors might also, by resolution, alter or add to the provisions of any composition previously accepted by them, without prejudice to any person taking interest under the original composition, who did not assent to the addition or variation. The provisions of the composition bound *all* the creditors whose names and addresses, and amounts due them, were shown in the statement of the debtor produced at the meeting at which the resolution was passed, but did not affect or prejudice the rights of any other creditors. Every composition was to provide for a *pro rata* money payment, and its provi-

sions might be enforced by the court in a summary manner on motion made by any person interested on reasonable notice; and any disobedience of the order of the court, made on such motion, was deemed to be a contempt of court.

If it should appear to the court after a hearing, that a composition could not, in consequence of any sufficient cause, proceed without injustice or delay to the creditors or debtor, the court might refuse to confirm the same, and might set it aside. In virtue of this power given the court, it might, on the one hand, examine carefully and see whether the debtor had been compelled to make an offer greater than his assets would warrant, and, on the other, interfere to secure equality among the creditors. In practice it has been found that obstacles are often thrown in the way of a satisfactory adjustment by the refusal of certain creditors to give their assent to propositions submitted unless they receive some special advantage. The proposed law before Congress seeks to correct this abuse by imposing a criminal liability upon a creditor who has received such an advantage.

In the matter of the bankrupt's discharge the amendment of 1874 also made radical changes, and drew a distinction between the treatment of involuntary and voluntary bankrupts, rather difficult to explain. An involuntary bankrupt might obtain a discharge from the court regardless of the proportion of his debts paid or of any assent on the part of the creditors, provided he was otherwise entitled thereto by reason of having kept regular books, committed no fraud, given no preferences, *etc.;* whereas a voluntary bankrupt had to pay thirty per cent. of his debts, or obtain the consent of one-fourth in number, or one-third in value of his creditors. In other words, it would seem as if the intention of the law-makers had been that the debtor who compelled the creditors to force him into bankruptcy was to be rewarded, while the debtor who voluntarily surrendered his property for the benefit of his creditors was to be punished. To obtain a discharge without paying any divi-

dends or procuring the assent of the creditors, a man was obliged to commit some one of the various acts of bankruptcy, many of which were in their nature fraudulent. This criticism, however, is directed at the unreasonable distinction, rather than at the liberal treatment of the involuntary bankrupt.

In all the Continental systems, we have seen that a discharge under a composition requires the assent of a certain proportion of the creditors. Unscrupulous creditors, it has been objected, often abuse their power by exacting promises from the debtor. The English, after declaring such promises void, have finally, by the law of 1883, withdrawn this power from the creditors and placed the debtor's discharge within the discretion of the court. Their example seems to have influenced the framer of the proposed law for the United States, for he suggests the advisability of granting a free discharge to every bankrupt who cannot be proved to have committed a fraud or wrong upon his creditors; and he further suggests that the creditors might vote that the assignee as their representative, rather than the creditors individually, should oppose the discharge of a fraudulent debtor. There is, no doubt, a strong sentiment in favor of this lenient view, but many will be of the opinion that a discharge should not be granted to a debtor who, with knowledge of his insolvency, has traded recklessly, or to one who is unable to pay a certain minimum proportion of his debts.

Finally, the jurisdiction in bankruptcy under the national law was vested in the Federal Courts. The procedure in these courts, which retain the old English systems of common law and equity pleading, is unfamiliar to many suitors, and even to many lawyers, who are accustomed only to practice under a code. To render the operations of bankruptcy simpler, the proposed law purposes to invest the Registers in Bankruptcy with quite extensive judicial powers, subject to appeal, and to require them to hold frequent sessions at convenient times and places. This would give the Register a position quite similar to the judge-commissary on the Continent.

CHAPTER II. THE INSOLVENT LAWS OF THE SEVERAL STATES.

§ 1. *The Inadequacy of the State Laws.* There are two broad principles upon which a bankrupt-law should be based, —to divide the debtor's property equally among his creditors, and to discharge him from the unpaid residue of his debts. The former of these principles rests upon strict justice and is universally recognized upon the Continent, as well as in England and the United States. The latter rests upon grounds of public policy and expediency, as well as of humanity, and is by no means so generally adopted. Viewed from the standpoint of the public interest, the theory of a discharge is that an undischarged bankrupt, burdened with the incubus of debt, will have no incentive to gain more than a mere livelihood, nor will he be likely to receive assistance from relatives or friends, when hordes of hungry creditors stand ready to pounce upon his acquisitions. The creditors, therefore, will reap no advantage from such a condition of affairs. On the other hand, the discharged bankrupt will begin afresh with renewed courage, and the community will not be deprived of his industry. A discharge will, of course, on this theory, be refused to a fraudulent bankrupt, since his labors are not deemed of any value to the community. The idea of a discharge is not generally approved upon the Continent, but has become firmly embedded in the laws of England and the United States.

The insolvent laws of the several states, which though quiescent during the operation of the Congressional statute regained their vigor upon its repeal in 1878, are from either point of view necessarily inadequate. In the first place, such laws cannot enforce equality among the creditors. It has been

quite generally the doctrine of the American courts that a domestic creditor who has attached his debtor's property is to be preferred to the trustee or assignee of a foreign bankruptcy, even though his attachment was secured subsequently to the adjudication of the foreign bankruptcy, and for this purpose the States of the Union are foreign to one another.

In the case of Kelly *versus* Crapo,[1] the facts were briefly as follows: In a suit commenced in New York against foreign debtors, citizens of Massachusetts, a warrant of attachment had been issued, and upon the arrival in the port of New York of a sea-going vessel, the debtor's interest in the ship was seized under the attachment by the plaintiff as sheriff. The defendants claimed as assignee of the debtor, appointed under the insolvency laws of Massachusetts prior to the issuing of the warrant of attachment. The court held that the lien acquired by the levy must prevail over the title of the assignee under the foreign insolvency laws.

In its opinion the court said:

"As a general rule personal property has no locality, but follows, as to its disposition and transfer, the law of the domicile of the owner. A voluntary conveyance, therefore, valid under the laws of the state where the owner resides, will operate to transfer it wherever situated. But a statutory transfer, in proceedings under State bankrupt and insolvent acts, *in invitum*, can affect only such property as is actually situated within the territory of such state, and has, *proprio vigore*, no force beyond its limits. In this state, a title acquired under foreign bankrupt or insolvent proceedings will not prevail over the lien of creditors attaching under our own laws property found there. No rule of comity requires our courts to subordinate the claims of our own citizens, under process provided by our own laws, to the title derived from statutory transfers in other states."

This decision was subsequently reversed by the U. S.

[1] 45 N. Y., 86, affirmed in 81 N. Y., at 385.

Supreme Court,[1] but on an entirely different point. The court held that the ship while on the high seas was within Massachusetts territory, and subject to the jurisdiction of the courts of that state. It therefore passed by the statutory transfer, and the title of the assignee in insolvency took priority over the claim of the New York creditor.

This is not simply a question of the conflict of laws, since the principle has been applied between citizens of states having similar laws upon the subject. It is rather a determination of the courts on grounds of a selfish public policy to give a preference to their own citizens or suitors within their own jurisdiction. In the case of Upton *versus* Hubbard,[2] the facts were as follows: A debtor residing in Massachusetts applied to a court of insolvency in that state for the benefit of the insolvent act. Under the laws of Massachusetts, the creditors chose a trustee, and the judge executed a conveyance of all the property of the debtor to the trustee, such conveyances operating, by express provisions of the statute, to vest all the property of the debtor in the trustee and to dissolve existing attachments. Previous to the application of the insolvent, various creditors residing in Massachusetts had attached in Connecticut a debt due the insolvent from Hubbard, a resident of Connecticut. While these suits were pending the trustee in insolvency brought a bill in equity in Connecticut against Hubbard and the attaching creditors, praying that the court would decree to whom the debt should be paid. In behalf of the trustees it was argued that since the policy and provisions of the insolvent laws of Massachusetts and of the insolvent laws of Connecticut were in harmony and substantially the same, the court of Connecticut should give to the assignment the same effect that the courts of Massachusetts would give, namely, to vest in the complainants an absolute title to the debt due from Hubbard

[1] U. S. Reports, 16 Wallace, 610.

[2] 28 Conn., 274.

to the debtor and by force of the *lex loci contractus* to dissolve the attachment lien acquired by the suits of foreign attachment, the dissolution being expressly provided for by the insolvent laws of Massachusetts in the same manner as those of Connecticut. Nevertheless it was held that the plaintiff being a foreign assignee could not sue in the Connecticut courts; that even if he could, the attaching creditors had obtained a good lien under the laws of Connecticut, which could not be affected by subsequent proceedings in insolvency in Massachusetts. In its opinion the court said:

"The attaching creditors by pursuing the steps of our law certainly acquired a lien upon the debt which no foreign proceedings under the bankrupt law of Massachusetts can destroy or impair without allowing an extra-territorial effect to the laws of that state in conferring title upon the assignees, which we cannot do. The right of the attaching creditors to the lien obtained by their attachments being good here must remain good, and we see not why they may not enforce that lien, by prosecuting their suits to judgment and execution, which is the only possible mode of realizing anything from the lien known to the law."

Again, in Booth *versus* Clark,[1] the court said:

"In England, an assignee in bankruptcy is held to be vested with the personal property of the bankrupt, which is in foreign countries, and her courts acknowledge the validity of the title of a foreign assignee to property in England, when such title emanates from a country which has a bankrupt law *similar* to her own. But this rule does not prevail in the United States, either as regards a foreign assignee or an assignee under the laws of another State in the Union."

These difficulties would not arise if the Continental solution of the question were accepted. According to the Continental

[1] 17 Howard (U. S.), 322.

theory, the sequestration by the court of the debtor's domicile, is regarded as a judgment transferring all his property to the syndic. This judgment is not *per se* capable of immediate execution outside the territory in which the debtor resides, but according to the general rules of international private law as recognized in Europe, it being shown that such a judgment was rendered in the debtor's domicile, the court of the foreign country appealed to will authorize the judgment to be enforced in its own territory.

In the second place, a discharge granted by a State law does not release the debtor from debts to foreign creditors, unless they have come within the jurisdiction and proved their debts in the bankruptcy. In Cook *versus* Moffat,[1] it was held that a certificate of discharge under an insolvent law will not bar an action brought by a citizen of another State, on a contract with the discharged debtor. In Felch *versus* Bugbee[2] the court says:

"This rule, rests entirely upon the citizenship of the party, and not at all upon the place of making or performance. It is the result of that train of reasoning which regards the insolvent laws of a State as local, having no extra-territorial force so as to act upon the rights of citizens of other States; and which holds that, as between citizens of the State, the discharge will bind them, as to all posterior contracts, whenever made or whenever to be executed; and as to citizens of other States, will not discharge any existing contract, although made or to be performed in the State granting the discharge."

This is equivalent to saying that in many cases a discharge under a State insolvent law is virtually worthless. Notwithstanding these limitations in its action, however, nearly every

[1] U. S. Reports, 5 Howard, 295.

[2] 48 Maine, 9.

State and Territory in the Union has such legislation operative within its own territorial jurisdiction.

2. § *The General Character of the State Laws.* In determining the character of this legislation, we may adopt the old English tests, and characterize a law as a bankrupt or an insolvent law according as it discharges a debtor from his debts, or simply from imprisonment. Wherever imprisonment for debt still exists, such insolvent laws will be found, but it is to be remarked that in several of the states, as for example New York, acts to relieve an insolvent debtor from imprisonment are still upon the statute books, although rendered practically useless by the virtual abolition of imprisonment for debt.[1]

Applying the above tests, we find laws providing for the ultimate discharge of the bankrupt's debts in California,[2] Con-

[1] New York *Code of Civil Procedure*. 3rd Edition, chap. ii, Title ii, Art. 1, § 111, and chap, xvii, Title i, Art. 2, §§ 2188–2199.

In several States imprisonment for debt is forbidden by constitutional provision: Alabama *Constitution*, Art. I, § 21; Texas *Constitution*, Art. I, § 15; Georgia *Constitution*, Art. I, § 21; Missouri *Constitution*, Art. I, § 9; Tennessee *Constitution*, Art. I, § 18. In others, cases of fraud are excepted: Florida *Constitution, Declaration of Rights*, § 15; Indiana *Constitution*, Art. I, § 22; Kansas *Constitution, Bill of Rights*, § 16; Nevada *Constitution*, Art. I, § 14; North Carolina *Constitution*, Art. II, § 16; California *Constitution*, Art. I, § 14; Nebraska *Constitution*, Art. I, § 20; Ohio *Constitution*, Art. I, § 15; Iowa *Constitution*, Art. I, § 19; Minnesota *Constitution*, Art. I, § 12; Oregon *Constitution*, Art. I, § 19. In still another group of States the exemption from imprisonment applies only in the case of debts arising *ex contractu*. Michigan *Constitution*, Art. VI, § 33; New Jersey *Constitution*, Art. I, § 17; Wisconsin *Constitution*, Art. I, §16. The constitutions of some other States provide that a debtor, where there is not a strong presumption of fraud, shall not be imprisoned after delivering up his estate for the benefit of his creditors. Kentucky *Constitution*, Art. I, § 19; Pennsylvania *Constitution*, Art. IX, § 16; Rhode Island *Constitution*, Art. I, § 11; Mississippi *Constitution*, Art. I, § 18.

[2] California *Code of Civil Procedure*, 1885, Appendix; Insolvent Act of 1880, Art. I, §1, and Art. VII, §§ 48–54; *Statutes*, 1880, chap. clxxv, Art. I and Art. VII, §§ 48–54.

necticut,[1] Idaho,[2] Maine,[3] Massachusetts,[4] Maryland,[5] Minnesota,[6] Nevada,[7] Oregon,[8] Vermont,[9] and Wisconsin.[10]

New York[11] has a voluntary bankrupt law known as the "Two-third Act," which enables the debtor to obtain a discharge, but it is necessary that two-thirds in value of his creditors should unite with him in the petition. This requirement has rendered the law of little practical value, and an insolvent estate is generally settled by means of an assignment for the benefit of creditors.[12] The fact that New York has never had a complete bankrupt law is due partly to the influence of some of its lawyers, among them Chancellor Kent, who were of the

[1] *General Statutes, Revision af 1887*, Title 13, chap. lii, § 531; *Laws, 1885*, chap. 110, § 125.

[2] *Revised Statutes, 1887*, PART III, Part III, Title xii, § 5875.

[3] *Revised Statutes, 1883*, chap. 70, §§ 44–49; *Acts and Resolves, 1878*, chap. 74, §§ 40–45, amended 1879, chap. 154, §20, and chap. 199, § 1.

[4] *Public Statutes, 1882*, chap. 157, §§ 80–95; *Supplement to the Public Statutes, 1882–1888*, chap. 236, §§ 1 and 9, chap. 322.

[5] *Public General Laws, 1888*, vol. II, Art. xlvii, § 5; *Laws, 1854*, chap. 193, § 4.

[6] *General Statutes, 1891*, chap. 57, Title 5, §§ 4260 and 4268; *Laws, 1881*, chap. 148 as amended 1885, chap. 73, and *Laws, 1881*, chap. 148, § 10. By this Minnesota law an insolvent debtor may make an assignment of all his property for the equal benefit of all his *bona fide* creditors who shall file releases of all their demands. A creditor refusing to give such release receives no benefit from the assignment.

[7] *General Statutes, 1885*, chap. xx, § 3845; *Laws, 1881*, chap. xcvii, §1.

[8] *The Codes and General Laws of Oregon*, compiled and annotated by W. L. Hill, 1892, chap. xxviii, §3187; *Laws, 1885*, page 75, Act. of Feb. 24, 1885, §2.

[9] *Revised Laws, 1880*, Title xii, chap. 93, § 1848 ff.; *Laws, 1880*, No. 1, § 17; 1876, No. 1, § 73.

[10] *Statutes, 1889*, chap. 179, § 4299; *Laws, 1889*, chap. 385, § 1.

[11] N. Y. *Code of Civil Procedure*, chap. xvii, Title i, Art. I, §§ 2149–2187; *Revised Statutes*, Sixth Edition, 1875, Part ii, chap. v, Art. iii, §§ 1 and 2; *Laws, 1817*, chap. lv, §§ 2.

[12] There have been recorded in the County of New York within the last five years only eight, and within the last ten years only thirty-nine discharges under the Two-third Act.

opinion that a law which discharged debts without full payment was demoralizing.

Michigan[1] has merely copied the New York legislation.

Both voluntary and involuntary bankruptcy exist in California,[2] Connecticut,[3] Maine,[4] Massachusetts,[5] Maryland,[6] Minnesota,[7] Nevada[8] and Vermont.[9]

No compulsory clause is found in the laws of Oregon, Wisconsin and Idaho. In Oregon,[10] there is merely a voluntary assignment law, but it is provided that in case it appears to the court that the assignor has been guilty of no fraud, nor concealment, nor division of his property to keep the same beyond the reach of creditors, but has acted fairly and justly and that his estate has been made to realize the fullest amount possible and not less than fifty per cent. of his indebtedness over and above all the expenses of the assignment, the court shall make an order discharging the assignor from any

[1] *General Statutes, 1882*, Vol. II, Title xxxv, Chap. 305, §§ 1 and 2.

[2] California *Code of Civil Procedure, 1885*, Appendix; Insolvent Act of 1880, Art. II, § 2, and Art. iii, § 8; *Statutes*, chap. clxxv, Art. II, § 2, and Art. III, § 8.

[3] *General Statutes Revision of 1877*, Title 13, chap. lii, §§ 501 and 507; *Laws, 1885*, chap. 110, §§ 95 and 101.

[4] *Revised Statutes, 1883*, Title vi, chap. 70, §§ 15 and 17; *Laws, 1878*. chap. 74, § 13; and 1881, chap. 14.

[5] *Public Statutes, 1882*. chap. 157, §§ 16 and 112; *Laws, 1881*, chap. 233; 1879, chap. 244, § 7; 1880, chap. 246, §5; 1881, chap. 233.

[6] *Public General Laws, 1888*, Art. xlvii, §§ 1 and 23. Creditors' petition must be based upon an "act of insolvency" committed by the debtor. *Laws, 1884*, chap. 193, § 1; 1880, chap. 172, and 1880, chap. 72, § 24; 1886, chap. 298, § 24.

[7] *General Statutes, 1891*, chap. 57, Title 5, §§ 4260 and 4263. *Laws, 1881*, chap. 148, §§ 1 and 2.

[8] *General Statutes, 1885*, chap. xx, Title xviii, §§ 3845 and 3884; *Laws, 1881*, chap. xcvii, §§ 2 and 40.

[9] *Revised Laws, 1880*, Title xii, chap. 93, §§ 1790 and 1870. *Laws, 1880*, No. 1, § 4; 1876, No. 1, § 15; and 1880, No. 1, § 22; 1876, No. 1, § 91.

[10] *Codes and General Laws* (Hill, 1893), Vol. II, chap. xxviii, § 3187; *Laws, 1885*, p. 76, Act of Feb. 24, 1885, § 2.

further liability on account of any indebtedness existing against him prior to the making of such assignment, and the assignor shall be freed from any liability on account of any unsatisfied portion of indebtedness existing against him prior to the assignment. In Wisconsin,[1] any person who shall have made a voluntary assignment for the benefit of his creditors, may be discharged from his debts upon compliance with the provisions of the act. He must within six months after filing a copy of his assignment in the office of the clerk of the court, file in the same office and present to the court his application for a discharge. The court will, thereupon, make an order requiring the creditors to show cause, if any, why the insolvent should not be discharged. A hearing is granted to the parties concerned. Any creditor opposing the discharge may demand that the cause of the debtor be heard and tried by a jury, and the debtor may be subjected to an examination. If it appears at the hearing that the debtor has in good faith made a voluntary assignment for the benefit of his creditors, and has in all respects complied with the law, the court will grant him a discharge from his debts. In Idaho,[2] any insolvent debtor owing debts exceeding three hundred dollars, may petition the court to be discharged. He must set forth, in his petition, his inability to pay his debts in full, his willingness to surrender all his estate, and his desire to obtain a discharge, and must annex thereto a schedule, inventory and valuation. The filing of such a petition is an act of insolvency, whereupon the petitioner must be adjudged insolvent.

Assignments in Kentucky[3] resemble bankruptcy only in so far as they are in some cases of a compulsory character. Assignments made in contemplation of insolvency, with the intent

[1] *Annotated Statutes, 1889*, chap. 179, §§ 4282, 4283, 4285, 4288, 4289, 4293, 4299; *Laws, 1889*, chap. 385, §§ 1, 2, 4, 5, 6, 11, 13.

[2] *Revised Statutes of Idaho*, PART III, Part II, Title xii, § 5876.

[3] *General Statutes, 1888*, chap. 44, Art. ii, § 1, 2, 4, 5; *Acts*, 1855–56, chap. 704, § 1, 2, 4, 5.

to give a preference, inure equally to the benefit of all creditors in proportion to the amount of their respective demands, including those which are future and contingent. All such transfers as are declared to inure to the benefit of all the creditors are subject to the control of a Court of Equity upon the petition of any person interested, filed within six months after the transfer is lodged for record or the delivery of the property transferred, and the court will compel the delivery of the property to a receiver, and effect an equal distribution among the creditors. Louisiana, whose jurisprudence is based upon the law of France rather than upon the English common law, has from the Continental standpoint a complete bankrupt system, in which, however, no provision is made for a discharge of the debts. The surrender of the debtor's property may be either compulsory or voluntary. On the one hand, any judgment creditor who shall have issued an execution which has been returned "No property found," after due demand may compel a debtor to make a surrender by petitioning the court of the debtor's domicile and alleging that he is a judgment creditor, and for what amount, that execution has issued, *etc.*, that he has reason to believe that the debtor has property, and praying that the debtor may be ordered to make the surrender. On the other hand, any person may make a cession of his property to his creditors provided the surrender be *bona fide*, without fraud and agreeably to the prescribed formalities. The debtor by this course stays all proceedings against his person and property, and in case he is under arrest secures a discharge, provided no charge of fraud is pending.[1]

The Georgia system[2] is somewhat in the nature of bankruptcy, but presents several peculiarities. It is provided that in case any corporation, trader or firm of traders shall fail to

[1] *Revised Statute Laws, 1876*, §§ 1781, 1784, 1790 and 1819; Acts, 1866, No. 80, § 1; 1855, No. 322, § 1.

[2] *Code*, Second Edition, 1882, Part II, Title ix, chap. vi, §§ 3149 a, 3149 b, 3149 d, 3149 g, 3149 f; *Acts*, 1880, 81, No. 375, §§ i, ii, iv, vii, and vi.

pay at maturity any matured debt, payment of which has been properly demanded of such debtor and by him refused, and shall be insolvent, it shall be in the power of a Court of Equity under a creditors' bill to which one or more of the creditors who have matured debts unpaid shall be necessary parties, to proceed to collect assets, real and personal, including choses in action and money, and appropriate the same to the creditors. The Chancellor in such cases has the usual equity powers to grant injunctions, appoint receivers, *etc.*, no preferences are allowed, and equality among the creditors is secured. The Chancellor may also recommend to the creditors of the defendant that they release him from further liability.

We see here a remnant of the distinction which formerly prevailed in England and does still in France and several other Continental legislations, *i. e.*, the application of the law to traders only. A trader is defined by this act as any person or firm who is engaged, as a business, in buying and selling real or personal estate of any kind, or who is a banker, broker, commission-merchant or manufacturer, manufacturing articles to the extent of five thousand dollars per annum.

True insolvent acts, by which upon the request of the debtor and the surrender of all his property his person may be discharged from imprisonment, are found in Arkansas,[1] Illinois,[2] Kentucky,[3] Montana,[4] New Jersey,[5] New York,[6] North Carolina,[7] Ohio,[8] Pennsylvania,[9] and Wisconsin.[10]

[1] *Digest of the Statutes, 1884*, chap. 7, §§ 285–292.

[2] *Revised Statutes, 1889*, Chap. 72; *Laws, 1871–72*, p. 490, amended, 1887, p. 194; Starr and Curtis' *Annotated Statutes, Supplement, 1885–1892*, chap. 72.

[3] *General Statutes, 1888*, chap. 58.

[4] *Compiled Statutes, 1887*, First Division, Title VII, chap. i, §§ 147–154.

[5] *Statutes, Revision of 1887*, Part I, pp. 497–506; *Supplement, 1877–1886*, p. 385; *Laws, 1853*, chap, xi; 1855, chap. cc; 1858, chap. xlix; 1885, chap. iv.

[6] *Code of Civil Procedure*, 3d edition, chap. xvii, Title i, Art. ii.

[7] *Code, 1883*, Vol. II, chap. 27, §§ 2942–2981; *Laws, 1868–69*, chap. 162.

[8] *Revised Statutes, 1890*, Vol. I, Part II, Title II, chap. 4, §§ 6359–6383.

[9] Brightly's Purdon's *Digest, 1700–1883*, Vol. I, pp. 892–902; *Supplement, 1889–91*, p. 2220, § 1.

[10] *Annotated Statutes, 1889*, chap. clxxx. §§ 4307–4316.

From the foregoing, it is seen, that the most complete bankrupt laws are found in the New England States. This may be partly accounted for by the fact that in those states action may be begun directly by attachment without notice or leave of court, so that the most vigilant creditor will obtain a great advantage. The New England merchants have, therefore, felt the need of laws that would dissolve all attachments made within a short period (usually four months) before the bankruptcy. In the agricultural states and territories of the West and South, on the contrary, with the notable exception of California, where a very full law was passed in 1880, the necessity for such legislation has not been so urgent.

§ 3. *The Provisions of the State Laws.* Without entering into details, we shall now consider some of the main features of the State laws.

(1) *Definition of Insolvency.* The general rule as laid down in Driggs *versus* Moore[1] is that a trader who is unable to pay all his debts in the ordinary course of business, as persons carrying on a trade usually do, is to be regarded as insolvent.

(2) *Opening of the Proceedings. A. Voluntary Insolvency.* As regards the circumstances entitling the debtor to invoke the aid of the insolvent laws, the general principle is that he must owe a certain amount which, with his inability to pay, his willingness to surrender his property, and his desire to obtain a discharge from his debts, must be set forth in his petition. In Massachusetts, for example, any inhabitant of the state owing debts contracted while such inhabitant, and whose debts amount to not less than $250, may petition for the benefit of the law.

B. Involuntary Insolvency. The creditors in the states having compulsory laws are entitled to petition to have the debtor declared insolvent and his property seized and distributed among his creditors. The grounds upon which the

[1] 1 Abb. (U. S.), 440.

petition may be based differ slightly in the various states, but are in general the following: That the debtor has fraudulently concealed his property, or has conveyed it away, or has allowed it to be attached and to remain so without dissolving the attachment, or has absconded or concealed himself to avoid arrest.

(3) *Precautionary Measures.* A messenger or an officer of the court is sent at once to take possession of the debtor's property and a meeting of the creditors is called. The debtor is usually entitled to notice of the proceedings so that he may be present and show cause, if any, why a commission should not issue against him.

(4) *Effects of the Adjudication.* The magistrate who has jurisdiction in insolvency takes possession of all the debtor's property except such as is exempt. At the meeting of the creditors an assignee is chosen in the manner provided by the statute. In most states both the number of creditors and the amount of their claims are regarded in determining the vote. The court conveys all the debtor's property to the assignee, who becomes virtually its owner, standing in the same relation to the property as did the debtor or assignor, and hence taking it subject to all the equities that affected it in the hands of the debtor. By the assignment, all the property passes to which the debtor had the legal or equitable title; but property held in trust does not. The title usually vests in the assignee from the date of the adjudication. If made by deed, however, it vests from the date of the deed. In some states it dates from the time of the petition, and in others only from the time when the assignee takes the oath imposed by statute.

(5) *Existing Attachments.* In the absence of statutory provision, an existing attachment would not be dissolved by proceedings in insolvency, and the vigilant creditor who had secured the attachment would be entitled to payment in full out of such property in preference to all other creditors; but the

statutes of many of the states declare void all attachments made within a certain time previous to the insolvency.[1]

(6) *Fraudulent Conveyances.* In many of the states, transfers made by a debtor on the eve of insolvency to prevent his property from coming into the hands of his assignee for the benefit of his creditors, are declared void, and the assignee may recover the property or its value as assets in the insolvency. Any fraudulent payment may likewise be recovered by the assignee for the benefit of the estate.

(7) *Assignee: His Powers and Duties.* The assignee when duly chosen and qualified becomes the agent of the creditors as well as of the insolvent, and has power to sell, dispose of, collect and convert into money all the debtor's property. He is clothed with all the powers necessary to obtain possession of the property assigned, and to collect the debts by process of law. He calls meetings of the creditors when so directed by the magistrate, and transacts all other necessary business. His duty is in general to observe good faith in all his transactions and to exercise reasonable diligence and care in the management of the trust. For violation of his duty the statutes generally provide that he is not only personally responsible, but may be dismissed from office. Many of the statutes enumerate causes for which he may be removed; for example, when he mismanages the estate, refuses to comply with the requirements of the law, becomes insolvent, refuses to give new bonds when required, or becomes incapacitated on account of lunacy, drunkenness, *etc.* The laws of most of the states also require the assignee to give a bond. In such a case, insolvency would not be a ground for removal.

[1] Massachusetts, *Public Statutes, 1882*, chap. 157, § 46; amended by *Laws 1885*, chap. 59. Maine, *Revised Statutes, 1883*, chap. 70, § 33. California, *Code of Civil Procedure, 1885*, Appendix; Insolvent Act of 1880, chap. clxxv, Art. iv, § 17. Rhode Island, *Public Statutes, 1882*, chap. 237, § 12. In Rhode Island the debtor may dissolve attachments by making an assignment within sixty days. Vermont, *Revised Laws, 1880*, Title XII, chap. 93, § 1820. Connecticut, *General Statutes, Revision of 1887*, Title 13, chap. lii, § 523. Minnesota, *General Statutes, 1891*, chap. 57, Title 5, § 4260.

The statutes generally provide that the assignee shall receive either a percentage or a reasonable compensation, but even in the absence of such a provision it has been held that by common law he is entitled to a fair compensation.[1]

(8) *Priority of Claims and Distribution of Assets.* All the creditors who have properly presented their claims are entitled to share in the distribution, and in the states where preferences are allowed, preferred creditors must be first paid. The distribution is made either in one payment, or in several successive payments or dividends. The order of payment is regulated in most states by statute, and is in general as follows:

1st. Claims of the United States.

2nd. Taxes and debts due to the State.

3rd. Rent. In some states, the landlord of the insolvent's premises is given a preference over other creditors arising from his right to distrain, when such right exists. The right to distrain has, however, been abolished in many states.

4th. Certain claims for labor, *etc.*

5th. Secured creditors.

(9) *Preferences.* The subject of preferences may be mentioned here, although it belongs more properly to assignments for the benefit of creditors. At common law a debtor on the verge of insolvency may not only dispose of his property for the benefit of all his creditors, but may, by the conveyance, give a preference to one creditor over another, or to one class of creditors over another class. This rule has been followed in England, the United States Supreme Court, and some of the states of the Union, for instance, New York. The preference may be made by the payment of money on the transfer of property. But the question is now settled by statute, and preferences are forbidden in most of the states. Among the exceptions are District of Columbia, Florida, Georgia,[2] Indiana,

[1] 16 Howard (U. S.), 35.

[2] *Code of Georgia, 1873,* § 1953.

Mississippi, Montana, Nevada, New Mexico, New York, North Carolina, Ohio, Texas, Utah and Virginia. In Alabama general assignments containing preferences are declared to inure to the benefit of all creditors equally, but this does not apply to mortgages given to secure debts contracted contemporaneously with the execution of the mortgage.

(10) *Discharge.* The right of a debtor to obtain a discharge differs in the several states. In some, an honest debtor may obtain a discharge without regard to the amount of the dividends. In others, this may be granted only upon payment of a certain per centage; or upon obtaining the assent of a majority of the creditors. In some states, also, the statutes declare that a second or third discharge either shall not be granted, or shall be granted only upon different and more severe conditions than the first. It is also provided that a fraudulent debtor shall not receive a discharge and certain acts are enumerated which shall be presumptive evidence of fraud; for example, giving security for debts within a certain period previous to the application for a discharge.

One effect of a discharge is that the debtor cannot sue or be sued in respect to the property transferred under such law for the benefit of creditors.[1] A discharge, however, will protect a debtor only when he pleads it, and an obligation so barred is a sufficient consideration to support a new promise to pay.

§ 4. *Voluntary Assignments for the Benefit of Creditors.* There remains still another way open to a debtor in failing circumstances. A voluntary assignment for the benefit of creditors, which is almost peculiarly an American institution, differs from bankruptcy in that it does not necessarily discharge the assignor from his debts. Such assignments have been defined as voluntary transfers by a debtor of all or a part of his property to an assignee or assignees, in trust to apply the same or the proceeds thereof to the payment of some or all

[1] 2 Dallas (U. S.), 276.

of the assignor's debts and to return the surplus, if any, to him. They "come into being not by operation of law or by force of any previous proceedings either by or against the debtor. They are purely the act of the debtor. They are contracts, and rest like all contracts upon the consent of the parties."[1]

Nearly all the states have passed laws to regulate the right of making assignments under the common law, by forbidding preferences in many cases and in all cases by prescribing more or less in detail the forms to be followed. This whole subject is treated very fully in Burrill on *Assignments*.

[1] Bishop, *Insolvent Debtors*, § 104.

PUBLICATIONS OF THE

AMERICAN

ECONOMIC ASSOCIATION.

The present volume (VII) contains:

THE SILVER SITUATION IN THE UNITED STATES. 118 pages. By F. W. Taussig, LL. B., Ph. D.

Nos. 2-3.—ON THE SHIFTING AND INCIDENCE OF TAXATION. 191 pages. Price $1.00. By Prof. Edwin R. A. Seligman.

Nos. 4-5.—SINKING FUNDS. 106 pages. Price $1.00. By E. A. Ross, Ph. D.

No. 6.—THE RECIPROCITY TREATY WITH CANADA OF 1854. (In Preparation.) By Prof. F. E. Haines, Ph. D.

Six complete volumes of the publications bound in cloth, sent, postpaid, for $25; or bound in half-morocco, for $28. Single volumes, bound in cloth, $5; in half-morocco, $5.50; in paper, $4; subscription, $4 per year. Orders and subscriptions should be addressed to

Publication Agent, American Economic Association,

BALTIMORE, MD.

THE JOHNS HOPKINS PRESS.

STUDIES IN HISTORY AND POLITICS.

Edited by HERBERT B. ADAMS.

The Eleventh Series now in progress. Subscription, $3.00 per year.

ANNUAL SERIES. 1883–1892.

SERIES I.—LOCAL INSTITUTIONS. 479 pages. $4.00.

SERIES II.—INSTITUTIONS AND ECONOMICS. 629 pages. $4.00.

SERIES III.—MARYLAND, VIRGINIA, AND WASHINGTON. 595 pages. $4.00.

SERIES IV.—MUNICIPAL GOVERNMENT AND LAND TENURE. 600 pages. $3.50.

SERIES V.—MUNICIPAL GOVERNMENT, HISTORY AND POLITICS. 559 pages. $3.50.

SERIES VI.—THE HISTORY OF CO-OPERATION IN THE UNITED STATES. 540 pages. $3.50.

SERIES VII.—SOCIAL SCIENCE, MUNICIPAL AND FEDERAL GOVERNMENT. 628 pages. $3.50.

SERIES VIII.—HISTORY, POLITICS, AND EDUCATION. 625 pages. $3.50.

SERIES IX.—EDUCATION, HISTORY, AND SOCIAL SCIENCE. 635 pages. $3.50.

SERIES X.—CHURCH AND STATE: COLUMBUS AND AMERICA. 630 pages. $3.50.

EXTRA VOLUMES.

I. THE REPUBLIC OF NEW HAVEN. By CHARLES H. LEVERMORE. $2.00.

II. PHILADELPHIA, 1681-1887. By EDWARD P. ALLINSON and BOIES PENROSE. $3.00.

III. BALTIMORE AND THE NINETEENTH OF APRIL, 1861. By GEORGE WILLIAM BROWN. $1.00.

IV-V. LOCAL CONSTITUTIONAL HISTORY OF THE UNITED STATES. By GEORGE E. HOWARD.

Vol. I.—Development of the Township, Hundred, and Shire. $3.00.

Vol. II.—Development of the City and the Local Magistracies (in preparation).

VI. THE NEGRO IN MARYLAND. By JEFFREY R. BRACKETT. $2.00.

VII. THE SUPREME COURT OF THE UNITED STATES. By W. W. WILLOUGHBY. $1.25.

VIII. THE INTERCOURSE BETWEEN THE UNITED STATES AND JAPAN. By INAZO NITOBE. $1.25.

IX. STATE AND FEDERAL GOVERNMENT IN SWITZERLAND. By JOHN M. VINCENT. $1.50.

X. SPANISH INSTITUTIONS OF THE SOUTHWEST. FRANK W. BLACKMAR. $2.00.

XI. AN INTRODUCTION TO THE STUDY OF THE CONSTITUTION. By MORRIS M. COHN. $1.50.

XII. THE OLD ENGLISH MANOR. By CHARLES M. ANDREWS. $1.50.

XIII. AMERICA: ITS GEOGRAPHICAL HISTORY, 1492–1892. By W. B. SCAIFE.

The set of ten series is now offered in a handsome library edition for $30.00.

The ten series, with twelve extra volumes, altogether twenty-two volumes, for $48.00.

THE JOHNS HOPKINS PRESS, BALTIMORE, MARYLAND.

Systematic Political Science

BY THE

UNIVERSITY FACULTY OF POLITICAL SCIENCE OF

COLUMBIA COLLEGE.

The University Faculty of Political Science of Columbia College have in preparation and intend to publish a series of systematic works covering the entire field of political science proper and of the allied sciences of public law and economics. The method of treatment will be historical, comparative and statistical; and it will be the aim of the writers to present the latest results of institutional development and of scientific thought in Europe and America. Each work will be indexed by subjects and authors, and the last volume will contain a topical index to the entire series.

The series will consist of the following nine works:

Comparative Constitutional Law and Politics. By JOHN W. BURGESS.

Comparative Constitutional Law of the American Commonwealths. By FREDERICK W. WHITRIDGE.

Historical and Practical Political Economy. By RICHMOND MAYO-SMITH.

Historical and Comparative Science of Finance. By EDWIN R. A. SELIGMAN.

Comparative Administrative Law and Science. By FRANK J. GOODNOW.

International Law. By JOHN BASSETT MOORE.

Historical and Comparative Jurisprudence. By MUNROE SMITH.

History of Political Theories. By WILLIAM A. DUNNING.

Literature of Political Science. By GEORGE H. BAKER.

The first of these works was published early in 1891, by Ginn and Co. The entire series will probably be completed within three years

COLUMBIA COLLEGE

University Faculty of Political Science.

Seth Low, LL.D., President. **J. W. Burgess,** LL.D., Prof. of Constitutional History and Law. **Richmond Mayo-Smith,** Ph.D., Prof. of Political Economy. **Munroe Smith,** J.U.D., Prof. of Comparative Jurisprudence. **F. J. Goodnow,** LL.B., Prof. of Administrative Law. **E. R. A. Seligman,** Ph.D., Prof. of Political Economy and Finance. **H. L. Osgood,** Ph.D., (Adj.) Prof. of History. **W. A. Dunning,** Ph.D., (Adj.) Prof. of History. **J. B. Moore,** A.M., Prof. of International Law. **F. W. Whitridge,** LL.B., Lecturer on the History of New York. **A. C. Bernheim,** Ph.D., Lecturer on City Politics. **Frederic Bancroft,** Ph.D., Lecturer on American History. **C. B. Spahr,** Ph.D., Lecturer on Taxation. **F. H. Giddings,** A.M., Lecturer on Sociology. **Ernest Freund,** J.U.D. Lecturer on Administration. **S. F. Weston,** A.M., Assistant in Economics.

COURSES OF LECTURES.

I. HISTORY.—(1) Outlines of Mediæval History (undergraduate course); (2) Outlines of Modern History (undergraduate course); (3) European History since 1815 (undergraduate course); (4) Political and Constitutional History of Europe; (5) Political and Constitutional History of England to 1688; (6) Political and Constitutional History of England since 1688; (7) Political and Constitutional History of the United States; (8) Constitutional History of the American Colonies; (9) Constitutional History of the United States since 1861; (10) Political History of New York State; (11) History of the Relations between England and Ireland; (12) Historical and Political Geography; (13) History of France since 1830; (14) Seminarium in European History; (15) Seminarium in American History.

II. POLITICAL ECONOMY.—(1) Elements of Political Economy (undergraduate course); (2) Historical and Practical Political Economy; (3) Science of Finance; (4) Communism and Socialism; (5) Statistics: Methods and Results; (6) History of Economic Theories; (7) Financial History of the United States; (8) Tariff History of the United States; (9) Railroad Problems; (10) Taxation and Distribution; (11) Sociology; (12) Crime and Penology; (13) Seminarium in Political Economy; (14) Seminarium in Science of Finance; (15) Seminarium in Social Science.

III. CONSTITUTIONAL AND ADMINISTRATIVE LAW.—(1) Comparative Constitutional Law of Europe and the United States; (2) Comparative Constitutional Law of the Commonwealths of the United States; (3) Administrative Law; (4) Law of Taxation; (5) Municipal Corporations; (6) City and State Politics; (7) Seminarium in Constitutional Law; (8) Seminarium in Administration.

IV. DIPLOMACY AND INTERNATIONAL LAW.—(1) History of European Diplomacy; (2) History of American Diplomacy; (3) Principles of International Law; (4) Extradition; (5) Seminarium in International Law.

V. ROMAN LAW AND COMPARATIVE JURISPRUDENCE.—(1) Institutes of Roman Law; (2) History of European Law, to Justinian; (3) History of European Law, since Justinian; (4) Comparative Jurisprudence: General Principles; (5) Comparative Jurisprudence: Special Relations; (6) International Private Law; (7) Seminarium in Comparative Legislation.

VI. POLITICAL PHILOSOPHY.—(1) History of Political Theories, ancient and mediæval; (2) History of Political Theories, modern; (3) History of American Political Philosophy; (4) Seminarium in Political Theories of the XIXth Century.

The course of study covers three years. The degree of **A. B.** is conferred at the end of the first year; **A.M.** at the end of the second; and **Ph.D.** at the end of the third. Any person not a candidate for a degree may attend any of the courses at any time by payment of a proportional fee. Twenty-four **fellowships** at $500 each are awarded to advanced students. Three **prize lectureships** of $500 each for three years are open to competition of graduates. For further information address REGISTRAR

STUDIES IN HISTORY, ECONOMICS AND PUBLIC LAW.

EDITED BY

THE UNIVERSITY FACULTY OF POLITICAL SCIENCE

OF COLUMBIA COLLEGE.

The monographs are chosen mainly from among the doctors' dissertations in Political Science, but are not necessarily confined to these. The monographs are published at irregular intervals, but are paged consecutively as well as separately, so as to form completed volumes.

VOLUME I.

1. The Divorce Problem—A Study in Statistics. By Walter F. Willcox, Ph. D. Price, 50c.
2. The History of Tariff Administration in the United States, from Colonial Times to the McKinley Administrative Bill. By John Dean Goss, Ph. D. Price, 50c.
3. History of Municipal Land Ownership on Manhattan Island. By George Ashton Black, Ph. D. Price, 50c.
4. Financial History of Massachusetts. By Charles H. J. Douglas, Ph. D. Price $1.00.

Vol. I Complete. 396 pp. Price $2.00. Bound, $2.50.

VOLUME II.

1. The Economics of the Russian Village. By Isaac A. Hourwich. Price, $1.00.
2. Bankruptcy. A Study in Comparative Legislation. By Samuel W. Dunscomb, Jr. Price, 75c.

Other numbers will be announced hereafter.

For further particulars apply to

PROFESSOR EDWIN R. A. SELIGMAN,

Columbia College, New York.

3 2044 020 496 42